Supreme Court, U. S.
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80-29
No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

CITY OF ST. LOUIS, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

I. Whether Title VII (42 U.S.C. §2000e, et seq.) authorizes a Court of Appeals to mandate, on interlocutory appeal, quota relief against a public employer in the form of a promotion quota, imposed without reference to the racial composition of the appropriate candidate pool and without reference to any valid means of ascertaining whether candidates are minimally qualified.

II. Whether, applying appropriate standards for preliminary injunctions in a Title VII case involving a public employer, a District Court may properly deny such relief on the basis of substantial evidence that the civil service employee selection procedure at issue was professionally developed and validated as job-related, where the job involved directly affects the public safety, notwithstanding contrary evidence on the issue of job-relatedness.

III. Whether a content valid selection procedure used by a public employer to rank candidates for promotion must be supported by "empirical evidence" of correlation between the selection procedure and job performance, above and beyond evidence showing the relationship between the selection procedure and a concededly complete job analysis, in order to permit the procedure's use as job-related under Title VII and the Uniform Guidelines on Employee Selection Procedures.

IV. Whether the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," being an interpretation by anonymous draftsmen of Guidelines which are themselves interpretations of Title VII, are entitled to the same judicial deference as the Guidelines.

PARTIES BELOW

The parties in the Court of Appeals were as follows:

Appellants: United States of America; Firefighters Institute for Racial Equality, a corporation; George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, Eugene Stanton, Preston Sims, each individually and on behalf of all other persons similarly situated.

Appellees: The City of St. Louis, Missouri; Frank C. Cummings, Acting Chairman of the Civil Service Commission of City of St. Louis; Fred Gould, a member of the Civil Service Commission, City of St. Louis; Charles Marino, Director, Department of Public Safety, City of St. Louis; Denis D. Broderick, individually and in his capacity as Fire Chief of the City of St. Louis; R. Elliott Scearce, individually and in his capacity as Director of the Department of Personnel, City of St. Louis.

Intervenors-Appellees: Joseph Blessing, Michael Davis, Robert Crowley, David Banta, Andrew Rios, George Hohmann, Don Blackwell, Nick Altmeyer and George Tschlis, each individually and as members of a class; Roland Ralston and William O. Hill.

The City of St. Louis and its officers named above are, of course, the Petitioners in this Court. Respondents hereinafter will be referred to respectively as the "Government," "FIRE" and "Intervenors".

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Cases Cited

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Association against Discrimination, Etc. v. City of Bridgeport, 594 F.2d 306, 19 FEP Cases 115 (2d Cir. 1979) 25

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Blake v. City of Los Angeles, 595 F.2d 1367, 19 FEP Cases 1441 (9th Cir. 1979), cert. denied, 48 USLW 3698 (1980) 17

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Dendy v. Washington Hospital Center, 581 F.2d 990, 17 FEP Cases 1227 (D.C. Cir. 1978) 15,16,20,27,28

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Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 16

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EEOC v. Local 638, etc., 532 F.2d 821, 15 FEP Cases 1618 (2d Cir. 1976) 10

Franks v. Bowman Transportation Co., 424 U.S. 747, 12 FEP Cases 549 (1976) 9

Furnco Construction Corp. v. Waters, 438 U.S. 567, 17 FEP Cases 1062 (1978) 10

Garza v. Texas Educational Foundation, Inc., 565 F.2d 909 (5th Cir. 1978) 16

Guardians Ass'n v. Civil Service Comm., New York City, ____ F. Supp. ____, 21 FEP Cases 1467 (S.D. N.Y. 1980) 11,22

Harper v. Mayor & City Council of Baltimore, 359 F. Supp. 1187, 5 FEP Cases 1050 (D.Md.), aff'd sub nom. Harper v. Kloster, 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973) 10

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McCullers v. City of Raleigh, 11 FEP Cases 1034 (E.D. N.C. 1975) 20

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Oburn v. Shapp, 521 F.2d 142, 14 FEP Cases 1046 (3d Cir. 1975) 15

Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 13 FEP Cases 517 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) 10,25

Pennsylvania v. O'Neill, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973) 25

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United States v. Board of Education, Garfield Hts., 581 F.2d 791 (6th Cir. 1978)..... 29

United States v. City of Chicago (Fire Dept.), 573 F.2d 416, 16 FEP Cases 908 (7th Cir. 1978)..... 11,12,18

United States v. City of Chicago, 549 F.2d 415, 14 FEP Cases 462 (7th Cir.), cert. denied sub nom. Arado v. United States, 434 U.S. 875 (1977) 9

United States v. Hayes International Corp., 415 F.2d 1038, 2 FEP Cases 67 (5th Cir. 1969) 16

United States v. N.L. Industries, Inc., 479 F.2d 354, 5 FEP Cases 823 (8th Cir. 1973) 10,27

United States v. South Carolina, 445 F. Supp. 1094, 15 FEP Cases 1196 (D.S.C. 1977), aff'd sub nom. National Education Ass'n v. South Carolina, 434 U.S. 1026, 16 FEP Cases 507 (1978)..... 19,22,28,29

United States v. Spectro Foods Corp., 544 F.2d 1175 (3d Cir. 1976)..... 12

Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670, 19 FEP Cases 587 (D.Md. 1979) 18

Vulcan Society v. Civil Service Comm., 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973) 9,11,16

Washington v. Davis, 426 U.S. 229, 12 FEP Cases 1415 (1976) 17

Washington v. Walker, 529 F.2d 1062, 12 FEP Cases 1075 (7th Cir. 1976) 20

White v. Carolina Paper Board, Corp., 564 F.2d 1073, 16 FEP Cases 44 (4th Cir. 1977) 10

Statutes, Rules, and "Regulations" Cited

Civil Service Reform Act of 1978, 92 Stat. 1113, 5 U.S.C. § 2301 (b)(1) 21

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1292 (a)(1) 13,27

28 U.S.C. § 2101 2

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Section 703 (h), 42 U.S.C. § 2000e-2 (h) 20

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Rule 702, et. seq., F.R. Ev. 24

Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1, et seq., 43 Fed. Reg. 38290 (Aug. 25, 1978) 2,3,4,17,18,19,22

29 CFR § 1607.14 (C) 17,18

Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996 (March 2, 1979) 2,6,18,19,23,24

EEOC Guidelines on Sex Discrimination, 29 CFR § 1604.10 (Appendix) 24

Other Authorities Cited

L. Cronbach, Essentials of Psychological Testing (1970) 18

B. Schlei & P. Grossman, Employment Discrimination Law (1976) (Supp. 1979) 9

Barrett, EEOC Guidelines: Accurate Interpretation a Must, 7 Assessment & Development 1 (Feb. 1980) . 23

Hunt, Civil Service Testing and Affirmative Action: A Psychologist's Perspective, 44 U. Cin. L. Rev. 690 (1975) 24

Johnson, Albemarle Paper Co. v. Moody: The Aftermath of Griggs and the Death of Employee Testing, 27 Hast. L.J. 1261 (1976) 21

Seelman, Employment Testing Law: The Federal Agencies Go Public with the Problems, 10 Urb. Law. 1 (1978) 17,22

BNA Daily Labor Report No. 67, April 6, 1978 19,23

____, No. 252, December 30, 1977 22

Comment, The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies, 28 Cath L. Rev. 605 (1979) 17,22

Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971) 17,18

Note, Employment Testing and Proof of Job-Relatedness: A Tale of Unreasonable Constraints, 52 Notre D. Law. 95 (1976) 24

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Come now Petitioners, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 9, 1980.

OPINIONS BELOW

The original opinion of the Court of Appeals, January 17, 1980, reversing the order of the District Court denying preliminary relief, is reported unofficially at 21 FEP Cases 1140. The opinion of the Court of Appeals as modified on denial of rehearing on April 9, 1980 is reported at 616 F.2d 350, and this version of the opinion is reproduced in Appendix A hereto, together with the order denying rehearing. The opinion of the District Court, filed June 4, 1979, is reported at 470 F.Supp.

1281, 19 FEP Cases 1643, and is reproduced in Appendix B. For the convenience of this Court, the previous opinions of the Court of Appeals, reported respectively at 588 F.2d 235, cert. denied, 99 S.Ct. 3096 (1979), and 549 F.2d 506, cert. denied, 434 U.S. 819 (1977), are reproduced in Appendices C and D.

JURISDICTION

The judgment of the Court of Appeals was initially entered on January 17, 1980. Timely petitions for rehearing were filed. The petitions for rehearing were denied and the opinion of the Court of Appeals modified on April 9, 1980. This Petition is filed within ninety days of that date. 28 U.S.C. §2101. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND "REGULATIONS" INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., are reproduced in Appendix G hereto. Although they are not in fact regulations, the Uniform Guidelines on Employee Selection Procedures (1978), adopted by the Equal Employment Opportunity Commission (EEOC), 29 CFR Part 1607, are reproduced in pertinent part in Appendix H. Similarly, the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," 44 Fed. Reg. 11996 (March 2, 1979) are reproduced to the extent relevant in Appendix I.

STATEMENT OF THE CASE

Following a judgment of the United States Court of Appeals for the Eighth Circuit finding that the selection procedure for promotion to fire captain in the St. Louis Fire Department did not comport with the standards required by Title VII of the Civil Rights Act of 1964, as amended, the United States District Court for the Eastern District of Missouri (Nangle, District

Judge) entered an order, *inter alia,* requiring Petitioners to develop a new selection procedure which complied with EEOC guidelines. Appendix E. Other aspects of this order induced another appeal, after which the District Court entered an order requiring Petitioners to immediately promote 12 black firefighters, with the option also of promoting 12 whites to the rank of fire captain, and directing Petitioners to develop a valid selection procedure not later than January 1, 1979. Appendix F.

Acting on the orders of the Court of Appeals and the District Court in the summer of 1978, experts employed by Petitioners began to develop and document the new fire captain selection procedure (hereinafter sometimes referred to as the "1979 examination"), utilizing the Uniform Guidelines on Employee Selection Procedures, initially published in December, 1977, 42 Fed. Reg. 66542 and finally adopted in August with an effective date of September 25, 1978. 43 Fed. Reg. 38290 (Aug. 25, 1979); Appendix H. The result of these efforts was a massive (in excess of 700 pages) validity report on the 1979 examination which was filed by Petitioners with the District Court on December 29, 1978. The purpose of the filing with the District Court was to permit the Government and FIRE to critique the 1979 examination in advance of its administration. See Appendix E, p. A-75. However, the Government and FIRE instead proposed, and all parties eventually agreed, that administration of the examination should proceed and objections would be reserved until after an assessment of adverse impact. Appendix A, p. A-5.

The 1979 examination was administered in two segments, a written, multiple-choice examination (30% of total score) and an assessment center (70% of score). Appendix B, p. A-33. The results of the written portion caused the Government to express reservations, but the assessment center was allowed to proceed. Upon publication of the final results, Petitioners acted immediately to promote candidates on the basis of their rank on the 1979 examination. Appendix A, p. A-5. The Government and FIRE obtained a temporary restraining order from the District Court after twenty-four firefighters (1 black) had been promoted. Appendix A, p. A-5—A-6.

The District Court held an extensive hearing on the question of whether to grant a preliminary injunction, generating a transcript of nearly 400 pages and numerous statistical exhibits in addition to the validity report previously filed.[1] Although a portion of the evidence adduced concerned adverse impact of the 1979 examination, by far the largest proportion related to the validity, under Title VII and the Uniform Guidelines on Employee Selection Procedures (1978), of the examination. Nearly all of the testimony given at trial was that of expert witnesses presented by each side.

On June 4, 1979, the District Court denied the application for a preliminary injunction and dissolved the temporary restraining order previously granted. In its opinion, 470 F.Supp. 1281, 19 FEP Cases 1643, Appendix B, the Court stated that the "issue to be decided by this Court at this juncture in the proceedings is whether plaintiffs have established 'a clear showing of probable success *and* possible irreparable injury' based upon plaintiffs' claim that the examination was not properly validated." Appendix B, p. A-33. The District Court assumed, without deciding, that promotions based upon an invalid examination having adverse impact would establish a possibility of irreparable harm. *Id.* Based on statistical evidence, the District Court concluded that there was no adverse ("disparate") impact on the assessment center portion of the 1979

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[1] The appeal below proceeded on a designated record. Rule 30(f), F.R.App.Pro., 8th Cir. Rule 11. Petitioners have previously requested that the Clerk of the Court of Appeals certify the entire record to this Court pursuant to former U.S.Sup.Ct. Rule 21, but Petitioners have been informed that the record will not be certified without the express request of the Clerk of this Court. Consequently, Petitioners have largely confined their Statement of the Case to facts which can be collected from the published opinions in this case, although some references to the record below have been deemed unavoidable. Petitioners respectfully suggest that full consideration of this petition requires that the record below be certified to this Court.

examination. Appendix B, pp. A-33—A-34. However, the Court concluded that the written portion of the test had an adverse impact and that the Government and FIRE had established a prima facie case of adverse impact on the examination as a whole. *Id.*

Reviewing the evidence of examination validity presented at the hearing, the District Court found that (1) content validity was the only feasible approach in this case; (2) the content of the written and assessment center portions of the 1979 examination was determined after development of a thorough job analysis; (3) an expert panel of incumbent fire officers (two white, two black) was used to analyze job tasks and link them to the knowledges, skills and abilities (KSA's) to which they related; (4) the tasks and KSA's were rated and ranked in terms of importance; (5) KSA's suitable for measurement by a written examination were identified by the expert panel and test items were prepared by the panel and Petitioners' test professionals; (6) test items and KSA's were linked and the difficulty of each item was rated in accordance with the difficulty of the position; (7) similar care was taken with respect to the assessment center concerning development of exercises and reliability of raters; (8) the statistical analyses performed by Petitioners supported the reliability of the written test, the assessment center, and the 1979 examination as a whole; (9) the criticisms of the examination presented by Dr. Richard Barrett (the Government's expert) were insufficient to warrant the conclusion that the 1979 examination was not valid; (10) the City acted in good faith to carry out the mandates of the courts and develop a valid examination. Appendix B, pp. A-36—A-38. In light of the record presented to it, the District Court held that the Government and FIRE had failed to establish probable success on the merits, and so denied relief.

On interlocutory appeal, the Court of Appeals for the Eighth Circuit "vacated" the order of the District Court denying a preliminary injunction, and also fashioned extensive affirmative

relief (which had not been requested in the District Court). Based on its own review of the evidence (see, e.g., Appendix A, p. A-19), and its own resolution of conflicting expert testimony, the Court of Appeals concluded that Petitioners had failed to prove that the 1979 examination was content valid. In reaching this conclusion, the Court relied not only upon the Uniform Guidelines but also very heavily upon the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures." See Appendix A, p. A-14. In applying the Guidelines and the Questions and Answers, the Court of Appeals accepted nearly every criticism of the 1979 examination advanced by the Government's expert, notwithstanding the trial court's express rejection of that testimony. Compare Appendix A, pp. A-17—A-19 with Appendix B, pp. A-37—A-38.

Having demolished the 1979 examination, the Court of Appeals proceeded to fashion both interim and long-term mandatory relief, in an attempt to finally dispose of the case on the merits. Appendix A, pp. A-25—A-26. As part of its mandatory relief, the Court ordered Petitioners to immediately promote eight black firefighters and to promote additional firefighters in a black/white ratio of 1:2 until all existing vacancies and thirty additional vacancies were filled. Appendix A, p. A-28. The Court noted that full implementation of its promotion quota would raise black representation in the fire captain rank to 26%, nearly equivalent to black representation in the firefighter rank, but the Court made no reference to the racial composition of those who actually took the 1979 examination. Compare Appendix B, p. A-34. The Court of Appeals gave a number of justifications for imposing quota relief on interlocutory appeal, including the "recalcitrance" of the City of St. Louis, although the Court did not question the District Court's express finding that Petitioners (including the City) had acted in good faith to carry out the mandates of the courts and to develop a valid examination. See Appendix A, p. A-27.

Although the Court of Appeals held that the 1979 examination was not valid for any purpose, the Court nevertheless directed Petitioners to make promotions on the basis of the assessment center segment of the examination, using segregated lists for black and white firefighters. Appendix A, p. A-28. The Court of Appeals apparently found *sua sponte* that assurance of minimal qualifications for promotion was obtained by the fact that all assessment center participants had five years' satisfactory service and had passed the written test, although the Court pointed to no evidence in the record to support that view. *Id.*, p. A-27.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. The Petition Ought To Be Granted Because The Questions Of Federal Law Presented Herein Are Recurring Questions Of Serious National Importance And Must Be Settled By This Court.

A. The decision of the Court of Appeals, by imposing promotion quota relief on interlocutory appeal wholly without reference to qualifications of candidates or the racial composition of the appropriate candidate pool, and without any evidence as to the necessity or propriety of such relief, represents a novel and extraordinary departure from principles of affirmative relief heretofore obtaining in Title VII cases, and illustrates the compelling need for articulation of more precise standards to govern the imposition of quota relief under Title VII.

This Court has held in other contexts that the use of mathematical ratios as "a starting point in the process of shaping a remedy" for illegal discrimination is not unconstitutional and is "within the equitable remedial discretion of the District Court." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 25 (1971). However, the Court has to date refrained from providing clear guidance to the lower courts in imposing such remedies in Title VII cases, although it has had at least one opportunity to do so. See *County of Los Angeles* v. *Davis,* 440 U.S. 625, 19 FEP Cases 282 (1979), vacating as moot *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 16 FEP Cases 396 (9th Cir. 1977).[2] Nevertheless, the lower federal courts have proceeded to impose quota relief regularly as a remedy under Title VII,

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[2] The practice of the lower courts in fashioning such race-conscious relief has been recognized by this Court, but has not been expressly approved. See *Regents of University of California* v. *Bakke,* 438 U.S. 265, 301-02, 17 FEP Cases 1000, 1015 (1978) (Powell, J.).

utilizing an almost bewildering variety of ratios and rationales. See, e.g., *United States* v. *City of Chicago,* 549 F.2d 415, 14 FEP Cases 462 (7th Cir.), cert. denied sub nom. *Arado* v. *United States,* 434 U.S. 875 (1977); *Vulcan Society* v. *Civil Service Comm.,* 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973); *Carter* v. *Gallagher,* 452 F.2d 315, 3 FEP Cases 900, modified on rehearing en banc, 452 F.2d 327, 4 FEP Cases 121 (8th Cir.) cert. denied, 406 U.S. 950 (1972); see generally, B. Schlei & P. Grossman, Employment Discrimination Law 1199-1200 (1976), *id.,* Supp. 322 (1979).

One of the questions Petitioners seek to present here is not the constitutionality of quota relief, but rather what "sound legal principles" guide the "judgment" of a federal court which is exercising its discretion to fashion quota relief under Title VII. Cf. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 10 FEP Cases 1181 (1975) (construing §706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(g), with respect to standards governing award of back pay). This question is particularly acute when the case involves promotion quotas, which have been imposed much less frequently and much more carefully than hiring quotas, see, e.g., *Sledge* v. *J.P. Stevens & Co.,* 585 F.2d 625, 18 FEP Cases 261 (4th Cir. 1978), cert. denied, 440 U.S. 981 (1979), and which are usually sought in cases involving public employers functioning under civil service systems, so that such relief will typically directly affect identifiable non-minority persons with legitimate expectations of promotion, see, e.g., *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420, 11 FEP Cases 38 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976).

This Court has frequently emphasized the remedial purpose of Title VII, e.g., *Albemarle Paper Co.* v. *Moody,* supra; *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 12 FEP Cases 549 (1976). The Court has also recognized that Title VII does not require employers to utilize employee selection pro-

cedures which maximize minority representation in the work force, *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 577-78, 17 FEP Cases 1062, 1066 (1978), and that all relevant statistics pertaining to the availability of minorities must be considered in assessing liability in hiring discrimination cases. *Id;* see also *Hazelwood School Dist.* v. *United States,* 433 U.S. 299, 15 FEP Cases 1 (1977). From these cases the principle follows that remedial employment quotas must be fashioned under Title VII with reference to the relevant pool of candidates or applicants. See, e.g., *EEOC* v. *Local 638, etc.,* 532 F.2d 821, 15 FEP Cases 1618 (2d Cir. 1976); *United States* v. *N.L. Industries, Inc.* 479 F.2d 354, 377, 5 FEP Cases 823, 841 (8th Cir. 1973) ("... in determining an appropriate minority-nonminority hiring ratio, we think that the number of qualified blacks available is an important factor. . . ."); cf. *Ostapowicz* v. *Johnson Bronze Co.,* 541 F.2d 394, 13 FEP Cases 517 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (sex discrimination case). This requirement would seem to be particularly pertinent when promotion quotas are involved, since the effect of such quotas will be to displace non-minority candidates who may have equal or superior qualifications. Cf. *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm.,* 482 F.2d 1333, 5 FEP Cases 1344 (2d Cir. 1973), cert. denied, 421 U.S. 991 (1975).

In fashioning quota relief, especially promotion quotas, some courts have also considered whether there is a "compelling need" for such relief, whether there was "egregious" or intentional discrimination, whether statistical disparities were extreme, and whether the discrimination found could otherwise be cured without a quota. See, e.g., *Sledge* v. *J.P. Stevens & Co.,* supra, 585 F.2d at 646-50, 18 FEP Cases 275-79; *White* v. *Carolina Paperboard Corp.,* 564 F.2d 1073, 16 FEP Cases 44 (4th Cir. 1977); *Harper* v. *Mayor & City Council of Baltimore,* 359 F.Supp. 1187, 5 FEP Cases 1050 (D.Md.), aff'd sub nom. *Harper* v. *Kloster,* 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973); *EEOC* v. *Local 638, etc.,* supra; *Kirkland* v. *New York*

State Dept. of Correctional Services, supra, 520 F.2d at 427, 11 FEP Cases at 43; cf. *Morrow* v. *Crisler,* 491 F.2d 1053, 7 FEP Cases 586 (5th Cir. banc), cert. denied, 410 U.S. 895 (1974). It has also been said that court-imposed quotas must be subjected to a "reasonableness test" to determine whether they provide an effective remedy for past discrimination without unnecessarily trammeling the interests of non-minority candidates for promotion. *Detroit Police Officers' Ass'n* v. *Young,* 608 F.2d 671, 20 FEP Cases 1728 (6th Cir. 1979), pet. for cert. filed, 48 USLW 3558 (1980) (No. 79-1080).

Because promotion quotas have been so sparingly utilized, it seems that no courts have addressed the issue of how one determines qualifications for promotion in the absence of a valid selection procedure. Some *hiring* quota cases have been able to avoid a similar problem by finding selection procedures to be valid on a pass/fail basis but not valid for ranking purposes, e.g., *Louisville Black Police Officers Org.* v. *City of Louisville,* ____ F.Supp. ____, 20 FEP Cases 1195 (W.D.Ky. 1979). Other courts have skirted the problem by simply barring the use of unvalidated, discriminatory selection procedures but giving the employers the option of continuing to utilize them on an essentially segregated basis. *Guardians Ass'n* v. *Civil Service Comm., New York City,* ____ F.Supp. ____, 21 FEP Cases 1467, 1472 (S.D.N.Y. 1980); see also *United States* v. *City of Chicago (Fire Dept.),* 573 F.2d 416, 429 16 FEP Cases 908, 916-17 (7th Cir. 1978) (promotions offered first to minorities on suspect eligibility lists until valid selection procedure implemented).

Finally, most courts have recognized the general principle that, even in Title VII cases, the framing of remedial decrees "'should take place in the District rather than the Appellate Courts,'" *Vulcan Society* v. *Civil Service Comm.,* supra, 490 F.2d at 399, 6 FEP Cases at 1053, quoting *International Salt Co.* v. *United States,* 332 U.S. 392, 400 (1947); see also *Dawson*

v. *Pastrick*, 600 F.2d 70, 19 FEP Cases 1540 (7th Cir. 1979). There are few, if any, reported instances (other than the case at bar) where the severe limitations on the granting of mandatory relief on interlocutory appeal have been ignored. Compare *United States* v. *Spectro Foods Corp.*, 544 F.2d 1175 (3d Cir. 1976) and *Dunn* v. *Retail Clerks, Local 1529*, 299 F.2d 873 (6th Cir. 1962) with *United States* v. *City of Chicago (Fire Dept.)*, supra.

Whether some or all of the foregoing considerations must figure in the decision to impose quota relief can only be decided by this Court. Whatever the standards for such relief are or should be, however, the need for the explication of standards by this Court is cast in sharp relief by the decision of the Court of Appeals in this case. It is not too much to say that in this case, equity varied like the Chancellor's foot. To be sure, the Court of Appeals offered numerous justifications for its draconian decree: immediate promotions to fire captain were required to vitiate morale and efficiency problems in the St. Louis Fire Department flowing from the large number of vacancies in the rank of captain; the possibility that further delays in promotion to captain would disadvantage blacks in competing for promotion to battalion chief; and "we suspect that there has been a certain amount of foot-dragging by St. Louis." Appendix A, p. A-27. But does this approach constitute "the principled application of standards consistent with" the principles of Title VII?[3] Clearly not.

The Court of Appeals in this case ignored the primary role of the District Court in framing relief, ignored the racial composition of the appropriate candidate pool, and ignored the question of how qualifications for promotion could properly be

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[3] See *Albemarle*, supra, 422 U.S. at 417, 10 FEP Cases at 1187.

determined in the absence of a valid selection procedure. Instead, the Court of Appeals substituted its discretion for that of the District Court, imposed a quota that will result in substantial overrepresentation of minorities in the affected job, and created its own means of determining minimal qualifications without a scintilla of evidence that its own chosen method was valid, i.e., demonstrably job-related.

The Court of Appeals' promotion quota effectively disposed of 68 fire captain vacancies, when the record showed that the complement in the rank was 162.[4] In so doing, the Court acted on a request for mandatory relief presented for the first time on interlocutory appeal under 28 U.S.C. §1292(a)(1). The Court noted that full implementation of its quota would result in blacks holding 26% of the fire captain promotions. Appendix A, p. A-27, n.25. The Court made absolutely no reference to the composition of the relevant candidate pool, although it did observe that blacks comprised 22% of all Fire Department personnel and 27% of entry level firefighters. The Court simply ignored the fact that, of those firefighters actually eligible to compete for promotion to fire captain, 15% were black.[5]

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[4] The complement of fire captains is now 148, due to fiscal constraints necessitating a reduction in St. Louis Fire Department manpower.

[5] Understandably, the composition of the appropriate applicant pool does not appear in the opinion of the Court of Appeals. The District Court found, however, that 15% of those who began the 1979 examination were black. Appendix B, p. A-34. The uncontradicted and uncontested evidence in the record shows that five years of service as a firefighter is necessary before one can be considered eligible to compete for promotion to captain. Defendants' Exhibit B (Validation Report), pp. 79 ff. There is no claim that blacks were deterred from taking the examination by past discrimination; in fact, the record shows that proportionately more black firefighters took the test.

Why was a quota resulting in minority representation of 26% in the fire captain rank necessary, when blacks comprised only 15% of the relevant candidate pool? No sound reason was given by the Court of Appeals, although perhaps its fashioning of relief was influenced by the "recalcitrance" or "foot-dragging" of the Petitioners. Yet in this respect the Court of Appeals disregarded two important factors: (1) twelve black firefighters had previously been promoted by order of the Court of Appeals to remedy past discrimination, see Appendix C, p. A-50; and (2) the District Court expressly found that Petitioners had acted in good faith to carry out the mandates of the courts and develop a valid selection procedure. Appendix B, p. A-38. It would seem that the Court of Appeals has some sort of "corruption of blood" theory regarding employers who have in the past been convicted of Title VII violations.

Perhaps most seriously, the affirmative relief fashioned by the Court of Appeals requires Petitioners to promote fire captains from segregated eligibility lists compiled on the basis of the assessment center portion of the selection procedure which the Court had held to be invalid. See Appendix A, p. A-28. To reach this result, the Court found that a field of (minimally qualified?) candidates existed because all persons on the assessment center list had five years of service and had passed the written portion of the examination! It is the height of irony that the written portion of the 1979 examination received the heaviest criticism from the Court of Appeals. One can only infer that the decision of the Court of Appeals was the product of inclination rather than a judgment guided by sound legal principles. Cf. *Albemarle,* supra, 422 U.S. at 416, 10 FEP Cases at 1187.

In short, the Court of Appeals' decision must be viewed as a significant departure from the norms of affirmative relief under Title VII - as well as from the norms of mandatory relief on interlocutory appeal. Because the type of quota relief fashioned by the Court below presents serious and sensitive issues, cf.

Regents of University of California v. *Bakke,* supra, the articulation of controlling standards by this Court is clearly in order. Accordingly, this Petition ought to be granted so that the judgment of the Court of Appeals can be reviewed and corrected by this Court.

B. The decision of the Court of Appeals threatens both the continued utility of content valid selection procedures and the existence and efficacy of traditional civil service merit systems based on competitive examination.

The decision of the Court of Appeals with respect to the selection procedure in this case raises a number of very serious problems. In the first place, it does nothing to clarify the prevailing confusion as to the appropriate standards for granting preliminary injunctions in Title VII cases. Compare Appendix A with *Dendy* v. *Washington Hospital Center,* 581 F.2d 990, 17 FEP Cases 1227 (D.C.Cir. 1978); *Oburn* v. *Shapp,* 521 F.2d 142, 14 FEP Cases 1046 (3d Cir. 1975). Moreover, the review methodology of the Court of Appeals in this case seems to guarantee that a preliminary injunction will issue as a matter of course in Title VII cases involving public employers' selection procedures. Here, Petitioners presented extensive evidence of a professionally developed and validated selection procedure in an effort to refute the Government's and FIRE's showing (if any) of probable success on the merits; but this proved Petitioners' undoing, since the Court of Appeals gave no deference whatever to the District Court's findings and made a frank attempt to dispose of the case on interlocutory appeal. See Appendix A, p. A-25. Yet, if Petitioners had limited their presentation to the mere introduction of the validity report prepared by its experts, there can be no doubt that the Court of Appeals would have held such evidence inadequate to refute probable success on the merits by

the Government and FIRE. Once again, it is a question of standards to be observed by the lower federal courts.[6]

This Court has held that preliminary relief affecting government personnel matters is not to be viewed in quite the same way as other applications for such relief. See *Sampson* v. *Murray*, 415 U.S. 61 (1974); compare *Garza* v. *Texas Educational Foundation, Inc.*, 565 F.2d 909 (5th Cir. 1978) with *United States* v. *Hayes International Corp.*, 415 F.2d 1038, 2 FEP Cases 67 (5th Cir. 1969). The Court of Appeals for the District of Columbia Circuit has recognized that preliminary injunctions affecting employee selection are not to be lightly granted when the employer presents substantial evidence of test validity, and the job is one which directly relates to the public health and safety. *Dendy* v. *Washington Hospital Center*, supra. Accordingly, it would seem that certiorari would be appropriate in this case in order to provide authoritative guidance to the lower federal courts and to prevent unnecessary disruption of the operations of public employers in similar cases.

Viewed as a substantive decision on the merits of Petitioners' claim that the 1979 examination for fire captain was job-related, the opinion of the Court of Appeals raises even more serious questions.

The 1979 examination for fire captain was developed as a content valid selection procedure - the only feasible method. See Appendix B, p. A-35; see also Appendix D, p. A-62. Content validity essentially is found when the content of the test matches the content of the job. E.g., *Vulcan Society* v. *Civil Service Comm.*, supra, 490 F.2d 395, 6 FEP Cases 1050. Stated

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[6] The Court of Appeals professed to review the District Court in terms of the "traditional" preliminary injunction standard (movant must show irreparable harm *and* substantial probability of success on the merits, see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)), but the opinion of the Court belies this at every step.

less simply, content validity is established by showing that the test is representative of and actually measures work behaviors necessary for successful job performance or that the test measures knowledges, skills and abilities used in and necessary for performance of important work behaviors. Uniform Guidelines on Employee Selection Procedures, 29 CFR §1607.14 (C) (4), Appendix H, p. A-133; see Comment, The Uniform Guidelines on Employee Selection Procedures; Compromises and Controversies, 28 Cath.L.Rev. 605, 622-23 (1979). Only after a long struggle in the courts and in the bureaucracy was content validity recognized in the Uniform Guidelines as the psychometric coequal of criterion-related validity, the darling of the original EEOC Guidelines. See *Washington* v. *Davis,* 426 U.S. 229, 247 n. 13, 12 FEP Cases 1415, 1422 n. 13 (1976); *Blake* v. *City of Los Angeles,* 595 F.2d 1367, 19 FEP Cases 1441 (9th Cir. 1979), cert. denied, 48 USLW 3698 (1980); see generally, Seelman, Employment Testing Law: The Federal Agencies Go Public with the Problems, 10 Urb.Law. 1 (1978); Comment, supra, 28 Cath.L.Rev. 620-21; Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1122-28 (1971).

In the case at bar, the Court of Appeals rejected the content validity of the 1979 examination for fire captain for two major reasons: (1) "Nothing in the record can be construed as empirical evidence of an association between levels of performance on the . . . examination and on the job," Appendix A, pp. A-15, A-20; and (2) "the circumstances of a multiple-choice examination are so dissimilar from the work situation as to make it impossible to establish job relatedness through a content validity study," id., p. A-21, n. 19. In reaching these conclusions, the Court of Appeals relied less on the Uniform Guidelines than on the explanatory Questions and Answers (discussed below), but the critical factors in the decision were obviously the use of written exercises as part of a selection procedure for a "physical doing, hands-on job," and the absense

of some (unspecified) direct, concrete evidence that good performance on the 1979 examination presaged good performance as a fire captain. Clearly, this view of the requisites of content validity grievously misconstrues the theory underlying that strategy and, if uncorrected by this Court, will restrict the use of content validity to the most elementary types of selection procedures (e.g., typing tests for typists).

The reasoning of the Court of Appeals concerning content validity is seriously deficient in several respects. First, as even the Questions and Answers recognize, content validity is primarily a judgmental process concerned with the adequacy of the selection procedure as a sample of work behaviors or necessary job knowledge. Question and Answer No. 62, Appendix I, p. A-176; see also L. Cronbach, Essentials of Psychological Testing 148 (1970). Content validity depends primarily on the adequacy of the job analysis in identifying critical work behaviors and knowledges, skills and abilities necessarily prerequisite to successful job performance. Uniform Guidelines, §1607.14(C)(1) and (2), Appendix H, p. A-131. The content valid procedure is not and cannot be a pure predictive procedure, see Developments in the Law, supra, 84 Harv.L.Rev. 1122, and nothing in the Guidelines or in any accepted professional standards provides that content validity is destroyed unless there is "empirical evidence" *outside the job analysis* that good test performance does indeed predict good job performance. On the contrary, in most cases, claims of content validity have foundered when the job analysis is held to be faulty or when the examination is found to be unrelated to the job analysis. See, e.g., *United States* v. *City of Chicago (Fire Dept.)*, supra; *Vanguard Justice Society, Inc.* v. *Hughes*, 471 F.Supp. 670, 19 FEP Cases 587 (D.Md. 1979).

In this case, the job analysis is unquestioned. See Appendix A, p. A-14, n. 13. Pursuant to this analysis, knowledges, skills and abilities were identified and rated in terms of importance by an expert panel as well as a cross-section of other fire depart-

ment personnel. See Appendix A, p. A-16; Appendix B, p. A-36; Defendants' Exhibit B (Validation Report) pp. 21-16, 40-60. As the District Court's findings indicate, Petitioners made a more than reasonable showing that the validity report was executed in a responsible, professional manner designed to produce trustworthy results. Since the quality of test preparation and validation was very high under professional standards, as evidenced by the production of an uncontested job analysis, it follows that the likelihood of validity—without any other "empirical evidence"—is correspondingly high. See *United States* v. *South Carolina,* 445 F. Supp. 1094, 15 FEP Cases 1196 (D.S.C. 1977), aff'd sub nom. *National Education Ass'n* v. *South Carolina,* 434 U.S. 1026, 16 FEP Cases 507 (1978); *Jones* v. *New York City Human Resources Admin.,* 391 F. Supp. 1064, 12 FEP Cases 264 (S.D.N.Y. 1975), aff'd, 528 F.2d 696, 12 FEP Cases 284 (2d Cir. 1976).

The Court of Appeals also seriously erred in its manifest hostility to the use of any type of written exercise as part of the selection procedure for a non-academic job. Nothing in the Guidelines or reported cases supports such a *per se* rule. Indeed, the Guidelines were themselves revised in conformity to professional criticism that the standards for content validity, as originally proposed, placed "the emphasis . . . on observable work behavior or work product and [neglected] situations where knowledge, skill or ability is essential to an outcome which is not necessarily a replication of the test." Compare BNA Daily Labor Report, No. 67, April 6, 1978, at A-22 with 43 Fed. Reg. 38295, Appendix G, p. A-106. If certain knowledges are identified by an adequate job analysis as necessary to performance, then it would seem permissible to test for such knowledges through any reasonable medium, not excluding a multiple-choice test, so long as no irrelevant difficulty is introduced. See, e.g., *Jackson* v. *Nassau County Civil Service Comm.,* 424 F. Supp. 1162, 14 FEP Cases 775 (E.D.N.Y. 1976); see also, Question and Answer No. 73; Appendix I, p. A-179.

If the decision of this Court of Appeals in this case remains undisturbed, it is readily apparent that the effect on public employees will be disastrous. The written competitive examination will be virtually outlawed, as will the traditional rank-ordering of candidates on civil service employment registers, even if done by means of assessment centers. Moreover, the use of content validity will be foreclosed as an effective validation strategy.

In sum, the need for clarification of the standard for issuance of preliminary injunctions in Title VII cases affecting public employers is plain. Judicial interference in public personnel matters is not to be embarked upon lightly. Compare *Sampson* v. *Murray,* supra, with *Bishop* v. *Wood,* 426 U.S. 341 (1976). "Civil service laws, like civil rights laws, were enacted to ameliorate a social evil," and "the judiciary should act with great reluctance in undermining traditional civil service concepts." *Kirkland,* supra, 520 F.2d 428, 11 FEP Cases 44; see also *Commonwealth of Pennsylvania* v. *O'Neill,* 465 F.Supp. 451, 464-65, 19 FEP Cases 55, 66 (E.D.Pa. 1979). Where, as here, the evidence clearly shows that the employer developed a selection procedure in a professional manner, designed to produce trustworthy results, in light of a thorough analysis of the particular job, with the assistance of minority employees, surely the District Court may properly deny preliminary relief, especially where the job in question directly affects the public safety. Cf. *Dendy* v. *Washington Hospital Center,* supra; see also *Washington* v. *Walker,* 529 F.2d 1062, 12 FEP Cases 1075 (7th Cir. 1976); *McCullers* v. *City of Raleigh,* 11 FEP Cases 1034 (E.D.N.C. 1975).

In a larger sense, it is also time to clarify the weight and nature of the burden imposed upon employers seeking to give

and act upon the results of professionally developed ability tests, see 42 U.S.C. §2000e-2(h)—a burden which, judging by the reported cases, has seldom been successfully carried by employers. "Courts must recognize that the art of psychological testing is imprecise." Johnson, Albemarle Paper Company v. Moody: The Aftermath of Griggs and the Death of Employee Testing, 27 Hast.L.J. 1239, 1261 (1976). Of late, it would appear that the private employer has largely abandoned the struggle. Cf. Seelman, supra, 10 Urb.Law. at 71 n. 331. Public employers, bound by civil service laws, have an obligation to strive to preserve the merit system so laboriously constructed in this nation since 1883, and there does not appear to be any sound alternative to the competitive examination. But even public employers will soon be forced, by decisions such as that of the Court of Appeals in this case, to foresake the principle that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures all receive equal opportunity." Civil Service Reform Act of 1978, 92 Stat. 1113, 5 U.S.C. §2301(b)(1).

In *Albemarle,* supra, Mr. Justice Blackmun wrote of his fear that "a too rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection." 422 U.S. at 449, 10 FEP Cases at 1197 (concurring opinion). With the decision of the Court of Appeals in this case, this prophecy has come to pass. Indeed, so rigorous has the burden on the employer become that not even exceedingly expensive and complex validation studies suffice. The employer is left with no choice but to engage in race-based employment selection; and, with consummate hypocrisy, the Government's own expert witnesses have advocated

precisely that![7] If this revisionist philosophy of "separate but equal" is to be repudiated, certiorari should issue so that this Court can review and reverse the judgment below.

C. The Court of Appeals accorded unwarranted and excessive deference to the "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures."

This Court has held that the EEOC Guidelines on employee selection procedures, being the administrative interpretation of Title VII by the enforcing agency, are entitled to great deference in the courts. E.g., *Albemarle Paper Co.* v. *Moody,* supra. While the process which led to the promulgation of the Uniform Guidelines by the EEOC and other agencies smacks more of bureaucratic legislation than of interpretation, see Seelman, supra, 10 Urb. Law. 3 ff.; Comment, supra, 28 Cath. L. Rev. 608-10; BNA Daily Labor Report, No. 252, December 30, 1977, at A-7, Petitioners do not here question that the Guidelines themselves provide the general standard of validity for the 1979 examination.[8]

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[7] "While conceding the difficulty of constructing a test for police officers that could be validated as having job relatedness, they both [Dr. Richard Barrett and Dr. James Fitzpatrick] testified that if tests such as this were used, the adverse impact on minorities should be eased by maintaining separate lists for blacks, hispanics, and whites, and selecting from these *separate lists* in a way would insure equal opportunity to the minorities." *Guardians Ass'n* v. *Civil Service Comm., New York City,* supra, 21 FEP Cases 1467, 1472 (emphasis added).

[8] In fact, Petitioners were under a mandate to follow the Guidelines in developing the 1979 examination. See Appendix D, pp. A-66—A-67; Appendix E. But see *United States* v. *South Carolina,* supra, 445 F. Supp. at 1113 n. 20, 15 FEP Cases at 1214 n. 20.

Petitioners do question, however, the heavy reliance of the Court of Appeals on the "Questions and Answers to Clarify and Promote a Common Interpretation of the Uniform Guidelines," 44 Fed. Reg. 11996 (March 2, 1979); Appendix I. Many of these Questions and Answers apparently originated with the expert witness who testified for the Government in this case, an individual notorious for the ease and uniformity of his criticism of employment tests, Appendix B, p. A-38. See Barrett, EEOC Guidelines: Accurate Interpretation a Must, 7 Assessment & Development 1 (Feb., 1980). Surely it is inappropriate to judicially validate one man's (or one group's) employment testing theories simply because they are published by a federal agency in the form of questions and answers.

Another problem lies in the likelihood that the Questions and Answers will change, but the Guidelines will remain the same. The Introduction to the Questions and Answers invites "users and other interested persons" to submit additional questions. 44 Fed. Reg. 11996; Appendix I, p. A-151. Yet the purpose of the Questions and Answers is professedly not to modify the Guidelines. Leaving aside for the moment the significant issue of whether the current Questions and Answers do modify the Guidelines,[9] it is apparent that routine judicial deference to the Questions and Answers will ultimately be incompatible with their purpose of promoting clarification and common interpretation of the Guidelines, without actually modifying them. Surely the administrative interpretation of administrative interpretations of Title VII have somewhat less eclat that the Court of Appeals would lead one to believe; otherwise the gloss will soon swallow the text.

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[9]It is fairly obvious that the Questions and Answers relied on by the Court of Appeals, Appendix A, pp. A-15, A-20, seriously undercut the testing of job knowledge in content valid examinations - which the Guidelines recognized only by reason of a revision which was grudgingly acceded to by the agencies in face of heavy criticism by Division 14 of the American Psychological Association. See Daily Labor Report No. 67, supra, at A-22.

It should be recollected that test validity cases are in substance very similar to those involving technical medical, engineering or economic issues, presenting factual questions which should be resolved without validation of particular theories by judicial decree. Note, Employment Testing and Proof of Job-Relatedness: A Tale of Unreasonable Constraints, 52 Notre D. Law. 95 (1976); see also Hunt, Civil Service Testing and Affirmative Action: A Psychologist's Perspective, 44 U. Cin. L. Rev. 690, 695-97 (1975); Rule 702, et seq., F.R.Ev. If employers must cope with a steady stream of "Questions and Answers"[10] as well as with the Guidelines, there is a danger that these bureaucratic pronouncements together will form a procrustean bed on which advanced and novel employment testing techniques will likely be torn to pieces — as was the assessment center in this case, which had previously been hailed by the Court of Appeals as an acceptable technique. Appendix D, p. A-67. Such a development can be forestalled only by review and rejection of the thoughtlessly deferential approach of the Court of Appeals to the Questions and Answers in this case.

II. The Petition Ought To Be Granted Because The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Circuits And Of The Supreme Court.

A. The manner in which affirmative relief was granted in this case is at variance with standards articulated by the Second, Third and Fourth Circuits.

By imposing a 33-1/3% promotion quota to achieve 26% minority representation in the rank of fire captain, without

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[10]It should be noted that the questions and Answers at issue here were not published in final form until after the examination in this case had been developed and partially administered. Moreover, the EEOC appears to have embraced the "Question and Answer" motif in other contexts, so that the status of this technique should be judicially determined as soon as possible. See 29 CRF §1604.10 (Appendix) (EEOC Guidelines on Sex Discrimination).

reference to the racial composition of the appropriate applicant pool, the Court of Appeals has plainly ignored the clear weight of authority in other Circuits. For example, in *Association against Discrimination, etc.* v. *City of Bridgeport,* 594 F.2d 306, 19 FEP Cases 115 (2d Cir. 1979), the Court of Appeals for the Second Circuit vacated the imposition of a 1:1 hiring quota and remanded for express findings as to why the quota "required the hiring of minorities and non-minorities in approximately a 1:1 ratio when minorities constituted only roughly 11 percent of those who took the test." 594 F.2d 311, 19 FEP Cases 119. In *Ostapowicz* v. *Johnson Bronze Co.,* supra, the Third Circuit observed, "Quotas are an extreme form of relief and, while this court has declined to disapprove their use in narrow and carefully limited situations . . ., certainly that remedy has not been greeted with enthusiasm." 541 F.2d 402, 13 FEP Cases 523, citing *Pennsylvania* v. *O'Neill,* 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973) (promotion quota reversed). With that, the Court in *Ostapowicz* vacated an order imposing a hiring quota without findings concerning the composition of the available work force.[11] 541 F.2d at 402, 13 FEP Cases at 523.

The need to identify and consider the appropriate applicant pool is all the more crucial in regard to promotion quotas in the civil service context, for, as the Second Circuit has astutely observed, *Kirkland* v. *New York State Dept. of Correctional Services,* supra, 520 F.2d 429, 11 FEP Cases at 45:

> A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court know in advance that

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[11]Admittedly, *Ostapowicz* was a sex discrimination case, but the citation of *Pennsylvania* v. *O'Neill,* supra, an otherwise cryptic decision, indicates that similar reasoning would be applicable to a race discrimination case in the Third Circuit.

> regardless of their qualifications and standing in a competitive examination, some of them may be by-passed for advancement solely because they are white . . .[12]

Influenced by these considerations, the Second Circuit reversed imposition of a promotion quota, albeit the case was not brought under Title VII.

The decision in this case also sharply conflicts with the approach to quota relief taken by the Fourth Circuit. In *Sledge* v. *J.P. Stevens & Co.*, supra, 585 F.2d at 646, 18 FEP Cases at 275, the Court held that, "assuming quotas are permissible elements of remedial decrees in employment discrimination cases, they are appropriate only under limited and compelling circumstances." The Court then proceeded to vacate the imposition of hiring and promotion quotas in view of the fact that alternative remedies were available and the employer was working diligently to eradicate discrimination. Id., 647-650, 18 FEP Cases 276-79.

In light of the foregoing, it is evident that the opinion of the Court of Appeals respecting relief in this case is not only a departure from settled principles of law under Title VII but also directly conflicts with decisions of the Court of Appeals for the Second, Third and Fourth Circuits. See generally, *Sledge* v. *J.P.*

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[12]Ironically, in the aftermath of the decision of the Court of Appeals in the case at bar, white firefighters have begun to invoke Title VII, claiming that Petitioners have discriminated against them by promoting black firefighters over them in accordance with the Court's order. EEOC (St. Louis) Charge No. 072801070 (Joseph Durham, 5/28/80); Charge No. 072801071 (John Welch, 5/27/80). While these charges are frivolous on their face and should not have been accepted for filing by the EEOC, they do illustrate the harsh impact of the quota and likelihood of exacerbation of racial tensions. See *Kirkland*, supra, 520 F.2d 429, 11 FEP Cases 45, quoting *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm., supra*, 482 F.2d at 1341, 5 FEP Cases at 1350.

Stevens & Co., supra.[13] This conflict should be resolved by this Court by reviewing and reversing the Court of Appeals in this case.

B. The Court of Appeals' decision on the issue of test validity in this case conflicts with decisions of the District of Columbia Circuit and of this Court.

Whether the decision of the Court of Appeals in this case is viewed as deciding only an interlocutory appeal from denial of a preliminary injunction (which it was), 28 U.S.C. §1292(a)(1), or as a final decision on the merits (which it frankly tried to be, see Appendix A, p. A-25), the correctness of the Court's judgment must in the final analysis rest on the propriety of the approach it took with respect to assessing the validity of the 1979 examination. Viewed in its proper context as an interlocutory appeal, the case turned on the showing by the Government and FIRE of substantial probability of success on the merits, as well as other factors. The Court of Appeals, by substituting its view of the conflicting expert testimony for that of the District Court, was able to hold that the Government and FIRE had shown probable success on the merits because Petitioners failed to demonstrate validity of the 1979 examination. See Appendix A, p. A-19. However, in *Dendy* v. *Washington Hospital Center,* supra, 581 F.2d at 992, 17 FEP Cases at 1229, a case quite similar to this, the Court of Appeals for the D.C. Circuit discussed the issue of grant or denial of a preliminary injunction as follows:

> The court must consider: (1) the likelihood that plaintiffs will prevail on the merits; (2) the prospect of irreparable injury to plaintiffs if relief is withheld; (3) the possibility of

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[13]The instant case also appears to be inconsistent with other decisions within the Eighth Circuit itself. See *Carter* v. *Gallagher,* supra, 452 F.2d 330-31, 4 FEP Cases 124-25; see also *United States* v. *N.L. Industries, Inc.*, supra.

> harm to other interested parties . . . if preliminary relief is granted; and (4) the public interest. Plaintiffs have the burden of establishing a substantial case on the merits. The merits of the case at bar will, of course, turn on whether plaintiffs can show discriminatory impact, and on whether defendants, in turn, can rebut this showing by demonstrating job-relatedness. . . . The burden of demonstrating job-relatedness is on defendants in a proceeding to decide the merits. However, on a motion for relief pending litigation, the court may take into account the possibility that defendant will be able to establish job-relatedness without a determination that it has shown a positive likelihood of doing so. Even as to issues where the burden at trial is on defendant, when the court is of the view that the motion for relief pending litigation (and the attendant change in the status quo ante) threatens harm to defendant, and the defendant has come forward with some evidence tending to support a defense, the court may take into account whether there is a substantial case for the defense without requiring defendant to establish a mathematical probability of success on the merits.

It is apparent that the Court of Appeals in the case at bar placed a much heavier burden on Petitioners than was warranted by the procedural context of the appeal, and a much heavier burden that the *Dendy* court would require. Since *Dendy* and this case represent singularly conflicting views of preliminary relief in Title VII cases, certiorari should issue to resolve the matter.

Perhaps more importantly, the opinion of the Court of Appeals in this case - viewed as a decision on the merits - takes an approach to validity of the 1979 examination which brings the Eighth Circuit into direct conflict with a decision of this Court.

In *United States* v. *South Carolina,* 445 F.Supp. 1094, 15 FEP Cases 1196 (D.S.C. 1977), aff'd sub nom. *National Educa-*

tion Ass'n v. *South Carolina,* 434 U.S. 1026, 16 FEP Cases 501 (1978), this Court summarily affirmed a decision of a three-judge court rejecting, *inter alia,* a Title VII attack on the validity of the National Teacher Examination, which excluded a disproportionate number of blacks from teaching jobs in the state and also affected pay scales, unfavorably for blacks. The court found that the NTE had been proved to be content valid, and this Court necessarily affirmed that conclusion on appeal. See 46 USLW 3312 (1977); cf. *United States* v. *Board of Education, Garfield Hts.,* 581 F.2d 791 (6th Cir. 1978). A major part of the validity study used in that case involved "content review panels" and "minimum score panels" composed of experienced teacher educators. These "expert panels" determined both the content of the examination for use in South Carolina and the minimum scores required for successful completion. See 445 F.Supp. 1112-13, 15 FEP Cases 1213-15.

Even the most superficial reading of the opinion of the Court of Appeals reveals that the method employed by Petitioners in constructing the 1979 examination closely parallels the method used by South Carolina.[14] See Appendix B, pp. A-36—A-38; see also Appendix A, pp. A-16—A-18. Petitioners' experts utilized not only an expert panel of two white and two black fire officers, but also extensively surveyed a cross-section of all ranks in the St. Louis Fire Department to ensure that the 1979 examination matched the content of the fire captain's job. The criticisms leveled by the Court of Appeals at the efficacy of this method are virtually identical to the criticisms rejected by the Court in *United States* v. *South Carolina,* supra. Compare 445 F.Supp. 1112-13, 15 FEP Cases 1214-15 with Appendix A, pp. A-16—A-18. It is essential to continued utility of content valid

examinations that the conflict between this case and *United States* v. *South Carolina* be resolved by granting this Petition and reversing the judgment below.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals for the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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[14]It should also be noted that the examination held valid in *United States* v. *South Carolina*, supra, was confined exclusively to tests of *knowledge* and did not purport to measure teaching skills. 445 F.Supp. 1108, 15 FEP Cases 1209.

Supreme Court, U. S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No 80-29

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

CITY OF ST. LOUIS, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

APPENDIX

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 79-1435

Firefighters Institute for Racial Equality, *et al.*,
Appellants,

vs.

The City of St. Louis, Missouri, a municipal corporation; *et al.*,
Appellees.

and

Joseph Blessing, *et al.*,
Intervenors-Appellees.

No. 79-1461

United States of America,
Appellant,

v.

The City of St. Louis, Missouri, a municipal corporation; *et al.*,
Appellees,

and

Joseph Blessing, et al.,
Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri.

Filed: April 9, 1980

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges.

ORDER

The petitions for rehearing en banc are denied.

After a careful reexamination of the record, in the light of the clarifications of that record supplied by the parties on their petitions for rehearing, the Court withdraws pages 25 through 34 and substitutes therefor the attached pages in the opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

For the Eighth Circuit

No. 79-1435

Firefighters Institute for Racial Equality, *et al.*,
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and

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United States of America,
Appellant,
v.
The City of St. Louis, Missouri, a municipal corporation; *et al.,*
Appellees,
and
Joseph Blessing, et al.,
Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri.

Submitted: September 13, 1979
Filed: January 17, 1980

Before HEANEY and ROSS, Circuit Judges,
and LARSON.* Senior District Judge.

HEANEY, Circuit Judge.

I.

PROCEDURAL HISTORY

This is the third appeal to come before us involving the employment practices of the St. Louis Fire Department. We initially held that a 1974 promotional examination for the position

of fire captain had a racially disparate effect. We remanded the matter to the district court with directions that it maintain jurisdiction until it approved a promotional examination validated in accordance with EEOC guidelines. *Firefighters Institute, Etc.* v. *City of St. Louis,* 549 F.2d 506 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977). In the second appeal, we noted that a valid promotional examination had still not been approved by the district court, that the number of black fire captains had decreased from four to one, and that fifty fire captain positions were vacant. We again remanded the matter to the district court with directions to it to order St. Louis to immediately promote twelve qualified black firemen, and authorized it to order St. Louis to promote an equal number of white firefighters. We fixed a deadline of January 1, 1979, for validating a promotional examination. *Firefighters Institute* v. *City of St. Louis, Mo.,* 588 F.2d 235 (8th Cir. 1978), *cert. denied,* 99 S.Ct. 3096 (1979).

Pursuant to our remand, the district court, on December 19, 1978, ordered the immediate promotion of twelve black firefighters to the position of fire captain and directed St. Louis to develop a valid promotional examination by January 1, 1979.

On December 29, 1978, St. Louis filed with the district court a copy of its "Validation Report for the Position of Fire Captain in the City of St. Louis." This report had apparently been under preparation since the summer of 1978. The report called for a two-part examination consisting of a written multiple choice portion, which would be weighted 30% in the total score, and an assessment center portion, which would be weighted 70% in the total score. The government received a copy of the report on January 3, 1979.

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*EARL R. LARSON, United States Senior District Judge, for the District of Minnesota, sitting by designation.

By letter of January 29, 1979, the United States expressed to St. Louis two areas of concern with respect to the proposed examination: the weight to be given the written portion of the test and the manner of administration and supervision of the assessment center portion of the test. The United States suggested that the selection process proceed without resolving these concerns so that the existence of adverse impact on blacks could be determined prior to any further litigation, a process which would additionally delay filling the vacancies. The Firefighters Institute for Racial Equality (FIRE), the black firefighters organization, did not object to the suggestion. The white firefighters organization, intervenors in the action, approved it. St. Louis accepted the suggestion and, on February 1, 1979, it filed a report informing the district court of the agreement to proceed with the examination with all parties reserving their rights to challenge the examination for failure to comport with the guidelines after the results of the examination were known.

St. Louis administered the multiple choice portion of the examination on February 27, 1979, and informed the United States of the results on March 13. The results showed a substantial difference in the mean scores of blacks and whites. Although the United States again noted its concern that this portion of the test was not content valid, it agreed with St. Louis that the selection process could proceed with the government reserving its right to challenge the validity of the test if it was found to impact adversely on blacks. The assessment center portion of the examination was administered on April 9, 1979, and thereafter was graded.

On Thursday, April 26, 1979, the Mayor of St. Louis, without consulting either of the plaintiffs or the City Attorney's office, announced the results of the combined portions of the test, proceeded to have an eligibility list certified and promulgated, and set in motion the promotion process. Sixteen white firefighters were appointed fire captains the following Monday morning, and seven additional whites and one black

were scheduled to be appointed that afternoon. The United States learned that an eligibility list had been certified on April 26, 1979, but was assured by counsel for St. Louis that no appointments would be made for at least a week. Attorneys for the United States and St. Louis agreed to meet on Monday afternoon; but by the time of their meeting, sixteen white captains had already been sworn in and thirty-two more were scheduled to be sworn in, eight on Monday afternoon and twenty-four on Wednesday. The United States agreed that the eight promotions scheduled for Monday afternoon could be made, and St. Louis agreed to refrain from further promotion until at least May 11.[1] The United States then sought and secured a temporary restraining order from the United States District Court blocking further appointments. A week later, on May 22, a hearing on the government's motion for a preliminary injunction was commenced. On June 4, 1979, the district court, after an extensive hearing, denied preliminary injunctive relief, vacated its restraining order and denied a motion for a stay pending appeal.

In the memorandum accompanying the denial, the district court noted that notwithstanding its prior explicit directives that any proposed selection process not be used until properly validated, the plaintiffs had chosen to ignore the procedures outlined by the court and had not contested the examination prior to its administration.[2] The district court, assuming that the

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[1]The United States consented to these promotions for two reasons: First, the eight firefighters had already undergone the required physical examinations and the United States preferred not to disappoint their expectations at that late stage. Second, the fire department had requisitioned thirty-three additional fire captain appointments, and the United States felt that the appropriate number of black candidates could be assured immediate promotions.

[2]The court's December 19, 1978, order read as follows:

> IT IS * * * ORDERED * * * that the City of St. Louis utilize best efforts to develop a properly validated examination for the position of fire captain by January 1, 1979. The Court shall

black firefighters would suffer irreparable injury if the appointments were to be made on the basis of the examination results, held that because the plaintiffs had not established a likelihood of success on the merits, they were not entitled to preliminary injunctive relief. It reasoned that even though the plaintiffs had

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assist in the expedition of resolving any parties' objections to said examination.

Its January 26, 1978, order read:

> If defendants wish to assert the validity of an examination, they shall submit to counsel for all parties at least sixty days prior to any intended use, evidence of the validity of the elements of the process, including a copy of the validation study and all underlying documents or data concerning the development of the selection process and its validity. If the parties are unable to agree upon the valdity of the process, the process shall not be utilized unless and until the Court determines, upon motion and such evidentiary hearing as it deems appropriate, that the process had been properly validated.

The report to the court, filed February 1, 1979, detailed the parties' agreement to proceed with the administration of the examination while reserving the right to challenge its validity. For some unexplained reason, the report was not brought to the court's attention. Given the specific language in the court's orders, the United States and FIRE were remiss in their failure to file their objections prior to the date the examination was scheduled to be administered. There is, however, some justification for this failure. An after-the-fact examination of the test results is essential to a determination of the examination's adverse impact, and a selection process which has no adverse impact is usually not held to be in violation of Title VII and does not need to be validated. *See* Uniform Guideline 1B, 43 Fed.Reg. 38,296 (1978); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *Moore* v. *Southwestern Bell Telephone Co.,* 593 F.2d 607, 608 (5th Cir. 1979).

The agreement to delay a challenge to the validity of the examination, however, does not justify FIRE'S failure to participate in the development of the examination or to encourage its members' participation. While we recognize that FIRE has only limited funds and while we understand that it is expensive to employ an expert in industrial psychology or a related field, FIRE could have asked the court to require St. Louis to provide money for it to hire an expert. We also find unpersuasive FIRE's argument that its participation in

established a prima facie case of discriminatory impact, the defendant had rebutted that case by establishing the validity and job-relatedness of the examination process. The court concluded:

> [T]he criticisms levelled at the examination simply do not defeat the overwhelming evidence that this examination was valid.***
>
> Based upon the record presented to this Court, the Court must conclude that plaintiffs have not fulfilled their burden of establishing probable success on the merits. Although the examination resulted in a disparate impact upon black applicants, it was sufficiently validated. Thus, defendants have fulfilled their obligations under the law.

II.

CONTENTIONS OF THE PARTIES

The United States contends on appeal that the district court erred in holding that the appellants were not likely to succeed on the merits of their challenge to the examination. It asks this Court to reverse the district court and to direct St. Louis to promptly fill at least 25% of the present fire captain vacancies with black firefighters. It also asks that St. Louis be directed to continue to fill vacancies on a ratio of three whites to one black

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the process would have operated as a waiver of its right to challenge the examination. FIRE could certainly have participated while preserving its right to challenge the use of the examination in light of any adverse impact.

We agree with the district court that the hardening of attitudes by St. Louis, FIRE and the white intervenors has exacerbated the already serious problems of tension and low morale within the fire department, but this hardening of attitude is not a reason to deny the black firefighters relief if the examination does not comport with the guidelines.

until a new eligibility list based on a properly validated examination is developed. Its contentions are generally supported by FIRE.

St. Louis asks us to affirm the district court's denial of preliminary relief. It argues that the district court correctly held that the plaintiffs were not likely to succeed in their challenge to the validity of the examination and, further, that even if the court erred in that determination, it correctly denied preliminary relief because the plaintiffs had suffered no irreparable injury. Finally, St. Louis contends that even if we find the district court incorrectly denied preliminary relief, the matter must be remanded for (1) the district court's determination of the scope of such preliminary relief, and (2) the district court's final determination of the validity of the examination.

III.

LIKELIHOOD OF SUCCESS ON THE MERITS

In our first opinion in this case, we determined that the EEOC guidelines applied to the development of a procedure for selecting which of St. Louis's firefighters should be promoted to fire captain positions. *Firefighters Institute, Etc.* v. *City of St. Louis, supra,* 549 F.2d at 510. We ordered St. Louis to develop a promotional examination that was valid under those guidelines. *Id.* at 513. The issue of likelihood of success on the merits is, therefore, to be decided on the basis of whether the examination is valid under the EEOC guidelines.[3] This requires a two-step analysis: (1) Did the selection procedure have an adverse impact on blacks? (2) If so, has St. Louis nevertheless shown that the examination complies with the EEOC's rules for

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[3]Four government agencies, including the Equal Employment Opportunity Commission, have adopted a revision of those guidelines since our earlier opinion. Uniform Guideline 1A, 43 Fed.Reg. 38,296 (1978). The parties agree that these revised Uniform Guidelines control this action.

determining the validity of the selection procedure? We agree with the district court's finding that the procedure had an adverse impact on blacks, but disagree with its determination that the examination was valid.[4]

A. *Adverse Impact.*

To determine whether blacks were adversely impacted by the examination, we have computed the number of blacks and whites who will be selected (1) if the sixty-two existing vacancies in the position of fire captain are filled from the eligibility list resulting from the examination, and (2) if the 120 expected promotions are made from the same eligibility list.[5]

An analysis of the examination results reveals that, in filling the existing 62 vacancies, 58 of the 348 white firefighters who completed the examination (16.7%) will be promoted while only four of the 56 blacks who completed the examination (7.1%) will be selected. It follows that the black selection rate will only be 42.5% that of whites. This rate is substantially below the 80% rate established in the Uniform Guidelines on Employee

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[4]In deciding to deny a preliminary injunction, the district court applied the "traditional standard" under which the plaintiffs were obligated to establish (1) a strong probability that they would succeed on the merits at trial, and (2) a likelihood that they would suffer irreparable harm without preliminary injunctive relief. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Young* v. *Harris*, 599 F.2d 870 (8th Cir. 1979). We accept this standard for the purposes of this appeal. We reverse the district court because we believe that certain of its factual findings were unsupported in the record and because it made errors of law which are set forth in detail in the opinion.

[5]These figures include the twenty-four promotions which have already been made on the basis of this examination.

Selection Procedures[6] as a rule of thumb for determining whether employer policies or practices have an adverse impact on employment opportunities for any race.[7]

A similar analysis reveals that 112 of the whites who completed the examination (32.2%) will be selected for promotion to the 120 expected positions while only eight of the blacks (14.3%) will be selected. Thus, the selection rate for blacks will be only 44.4% that of whites. This rate is also substantially

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[6]Section 4D, 43 Fed.Reg. 38,297 (1978), provides:

> A selection rate for any race * * * which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

We find no merit to St. Louis's contention that the pool of black applicants was too small to exhibit adverse impact under the Guidelines. *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975), is inapposite because the selection pool in that case consisted of only five persons while sixty-five blacks took the written examination in this case. *Moore* v. *Southwestern Bell Telephone Co.*, 593 F.2d 607 (5th Cir. 1979), relied on by the appellees, is also inapposite because no adverse impact under the 80% rule was shown where the black selection rate was approximately 93% that of the whites. We likewise find no merit to St. Louis's contention that the selection pool was inappropriate or atypical because of the prior court ordered appointment of twelve blacks. Twelve whites were also appointed and the pool of black qualified applicants may have been larger had blacks not been discriminated against in hiring by the fire department for many years.

[7]If the written portion of the test alone is considered, the selection rate for blacks would only be 20.1% that of whites. If only the assessment center portion is considered, the black selection rate would be 54.3% that of whites.

below the 80% rate established in the guidelines.[8] It follows that the examination impacts adversely on blacks.

B. *Validity of the Examination*

Having determined that the selection procedure had an adverse impact on blacks, we turn to the question of whether the procedure is valid under the Uniform Guidelines. St. Louis attempted to establish the validity of the examination[9] through a process known under the guidelines as content validation. Uniform Guideline 5A, 43 Fed.Reg. 38,298 (1978).

(1) *The Multiple Choice Portion of the Examination.*

In our view, the multiple choice portion of the examination is not content valid under the Guidelines.[10] Because the test is a written, multiple choice examination purporting to select those firefighters who can be expected to perform the best in a physical, stressful job, empirical evidence that the examination will actually accomplish that goal is required. None has been presented.

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[8]If the written portion of the test is considered alone, the selection rate for blacks would only be 42.7% that of whites. If the assessment center portion only is considered, the black selection rate would be 75.6% that of whites.

[9]Although the selection procedure included physical, year-in-service and satisfactory grade requirements as well as the examination, we do not understand the plaintiffs to be challenging any portions of the procedure other than the two-part examination.

[10]Neither St. Louis's good intentions nor the size of its expenditure is determinative of the issue of whether the examination is content valid. *See United States* v. *San Diego County,* 20 EPD ¶30,154 (S.D. Cal. July 6, 1979).

The job of fire captain in the St. Louis Fire Department involves the fighting of fires, the supervision of firefighters at the scene of a fire, the instruction and training of firefighters at the firehouse, and the maintenance of good morale and working relationships within the captain's group. The captain's job does not depend on the efficient exercise of extensive reading or writing skills, the comprehension of the peculiar logic of multiple choice questions, or excellence in any of the other skills associated with outstanding performance on a written multiple choice test. Because of the dissimilarity between the work situation and the multiple choice procedure, greater evidence of validity is required.[11]

The multiple choice test consisted of 130 items. The items were drawn from a list of knowledges and abilities,[12] which were developed from a list of a fire captain's job tasks.[13] The can-

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[11] "[As] the setting and manner of the administration of the selection procedure less resemble the work situation, * * * the less likely the selection procedure is to be content valid, and *the greater [is] the need for other evidence of validity.*" Uniform Guideline 14C(4) (emphasis added). 43 Fed.Reg. 38,302 (1978).

[12] A test of knowledges and abilities may be used it it measures a representative sample of knowledges, skills or abilities that (a) are necessary to performance of that job, and (b) are operationally defined in Guideline 14C(4). Uniform Guideline 14C(1). 43 Fed.Reg. 38,302 (1978). If a knowledge is to be measured, it must be defined in terms of behavior and it must be part of a body of learned information that is actually used in and necessary for critical or necessary job behaviors that are observable. Uniform Guideline 14C(4), 43 Fed.Reg. 38,302 (1978). If an ability is to be measured, the ability must be defined in terms of observable aspects of job behavior and should be an ability actually used in and necessary for the performance of critical or important work behaviors. *Id.* Any selection procedure measuring an ability should closely approximate an observable work behavior. *Id.*

[13] The plaintiffs do not contest the adequacy of the description of job tasks and behaviors under the Guidelines.

didates were required to choose one correct response for each item, and the tests were graded exclusively on the basis of the number of "right" answers. These scores were then computed with the assessment center scores to determine each candidate's rank in the overall selection process. Because these test results were used to rank candidates, St. Louis must prove that the results are associated with different levels of job performance.[14]

The EEOC's "Questions and Answers,"[15] which provide uniform interpretations and explanations of the Guidelines, explicitly address the requirements for using written examinations which measure knowledge to rank job candidates. They specifically require *empirical* evidence that mastery of more knowledge is linked with better performance on the job.

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[14] "Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance." Uniform Guideline 14C(9), 43 Fed.Reg. 38,303 (1978).

"The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines." Uniform Guideline 5G, 43 Fed.Reg. 38,298 (1978).

[15] These Questions and Answers were adopted by the four agencies that promulgated the Uniform Guidelines. Their intent is to "interpret and clarify, but not to modify, the provisions of the Uniform Guidelines." 44 Fed.Reg. 11,996 (1979). Such interpretations are entitled to great deference by the court, especially where, as here, the Guidelines themselves are highly technical and somewhat difficult for those untrained in test construction to comprehend.

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used

> Any conclusion that a content validated procedure is appropriate for ranking must rest on an inference that higher scores on the procedure are related to better job performance. The more closely and completely the selection procedure approximates the important work behaviors, the easier it is to make such an inference. * * *
>
> Where the content and context of the selection procedure are unlike those of the job, as, for example, in many paper-and-pencil job knowledge tests, it is difficult to infer an association between levels of performance on the procedure and on the job. * * * To justify use of such a test for ranking, it would also [in addition to tying tested knowledges to work behaviors] have to be demonstrated from *empirical evidence either that mastery of more difficult work behaviors, or that mastery of a greater scope of knowledge corresponds to a greater scope of important work behaviors.*

Question and Answer No. 62, 44 Fed.Reg. 12,005 (1979) (emphasis added).

Nothing in the record can be construed as empirical evidence of an association between levels of performance on the multiple choice examination and on the job.[16] St. Louis, in its descrip-

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> is in doubt. * * * [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

Udall v. *Tallman,* 380 U.S. 1, 16, 17 (1965), citing *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 413-414 (1945). *See generally* K. DAVIS, Administrative Law Treatise §7.22 (2d ed. 1979).

[16] Webster's New World Dictionary defines "empirical" as:

> 1. relying or based solely on experiment and observation rather than theory [the *empirical* method] 2. relying or based on practical experience without reference to scientific principles [an empirical remedy].

See Western Addition Community Organization v. *Alioto,* 360 F.Supp. 733, 736 n.5 (N.D. Cal. 1973).

tion of the development of the test items, explained that each member of the expert panel, which consisted of two fire captains and two deputy chiefs, examined each test item and indicated whether he thought it required basic knowledge or advanced knowledge. The form on which the panel members made this evaluation described "advanced" as performance-differentiating. St. Louis's expert also testified that the expert panel analyzed the tested knowledges and abilities to determine whether they were performance-differentiating. These exercises by the panel members, however well-intentioned, are not a form of empirical evidence. They are basically opinion and conjecture, not actual observation of the correlation between the extent of mastery of the knowledges or abilities sought to be measured by the test and job performance.[17]

The requirement of empirical evidence to sustain the validity of the multiple choice test is logical and consistent with the spirit of the Guidelines. A procedure that selects candidates on the basis of their performance on a test that closely mirrors actual job behavior would, understandably, be more likely to accurately predict how well the candidates will do on the job. The Questions and Answers offer an example of such a selection procedure. An employer may use a typing test to select persons to fill a job that consists almost entirely of typing. Question and Answer No. 62, 44 Fed.Reg. 12,005 (1979). It is fairly easy to in-

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[17] We do not rest our decision on the validity of the multiple-choice test on Dr. Richard Barrett's testimony that the demonstrated reliability coefficient of .84 was not sufficiently high for a valid examination. Mr. Edmund Knowles, the expert witness for St. Louis, testified that a reliability coefficient of .84 was sufficient and we do not quarrel with the district court's finding that the test was reliable. However, a showing of reliability does not end the matter. All such an analysis shows is that those persons who did the best on the examination tended to do the best on most of the same questions and that those who did less well on the test tended to do less well on most of the same questions. The principal criticism of the multiple choice test is that there is no showing that those persons who received the highest scores on the test would, in fact, perform the best as fire captains.

fer that such a test is job related and that, if fairly administered, its results might be used in spite of a showing of adverse impact.

A different situation exists here, however, and justifies the requirement of additional evidence of validity. A fire captain's job is a physical, hands-on job. It involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test. The development of this type of test requires many stages and levels of analysis and a mistake at any stage can destroy the validity of the examination. If the knowledges chosen to be tested are not appropriate to the job, are poorly articulated, are incomplete in some respect or over-emphasize some aspect of work behavior, the examination will be invalid. If the knowledges are not accurately weighted, or if the test disproportionally samples the knowledges, the examination will be invalid. If the test questions are poorly drawn, incomplete or simply inappropriate for sampling the knowledges sought, the examination's validity is destroyed to the extent of those deficiencies. Because of all these potentials for error, it is logical and reasonable to require something concrete to validate an examination which has an adverse impact on blacks.

The multiple choice test has not been shown to be content valid for the additional reason that St. Louis has not shown that the selection procedure measures "those aspects of performance which differentiate among levels of job performance." Uniform Guideline 14C(9), 43 Fed.Reg. 38,303 (1978). We are not satisfied with the expert panel's method of predicting the ability of an item to differentiate job performance based on whether it required basic or advanced knowledge. Dr. Richard Barrett, the plaintiff's expert witness, testified that the task of predicting the actual difficulty of test items is itself very difficult, even for a trained industrial psychologist. He expressed great doubts about the ability of an expert panel, untrained in matters of test construction, to make that determination. Even if the panel was

capable of making this determination, however, its results do not support use of the test for ranking. The panel decided that 77 of 130 test items were basic and that only 53 were advanced or performance-differentiating. There is no showing in the record that the number of each type of item in the advanced group was proportionate to the weight which the expert panel assigned to the corresponding knowledge or ability. We are left with a group of 53 items which the panel declared to be performance-differentiating but which have not been shown to be correlated with the importance of the knowledges and abilities they tested.

The results of the multiple choice examination reveal another problem with its use as a ranking device. Ninety percent of the examinees correctly answered 30% of the 130 items, and 80% of the candidates correctly answered 50% of the questions. This again demonstrates a reliance on a relatively small number of test items to rank the candidates. Further, there has been no showing that these more difficult items correlate in number or difficulty with the knowledges and abilities thought to be performance-differentiating.

Moreover, a large portion of the multiple choice test, viewed by itself, reveals additional infirmities. Twenty of the 130 items purport to test a candidate's "ability to size up a fire." Since this is a test of an ability rather than a knowledge, the Uniform Guidelines require the test itself to "closely approximate an observable work behavior." Uniform Guideline 14C(4). St. Louis does not argue that writing a multiple choice examination closely approximates firefighting. Thus, the pool of items on which St. Louis can rely in arguing that its measurement of test performance differentiates among levels of job performance is again reduced. What remains is a series of questions that we cannot say are representative of the necessary performance-differentiating knowledges and abilities.

Many additional criticisms of the multiple choice examination were offered at the hearing by Dr. Barrett and by Captain Daniel Austin, a twenty-seven-year fire department veteran. We do not intend to go into them in detail. We note, however, that several were substantive in nature, suggesting that the examination measured items of knowledge that were not necessary for successful performance of a fire captain's job, and several were more technical, criticizing the construction of the test items themselves.[18] To the extent that these criticisms are valid, they again reduce the pool of potentially performance-differentiating items and weaken the case for the examination's validity.

On the basis of the record before us, we cannot find that St. Louis has shown the multiple choice portion of the examination to be valid under the Uniform Guidelines. We hold that the district court incorrectly applied the Guidelines in determining that the plaintiffs had little probability of success on the merits of their action.

(2) *The Assessment Center.*

We turn now to the validity of the assessment center portion of the examination. This section of the examination consisted of three parts: a fire-scene simulation, in which the candidates were shown slides of a large fire and were asked to respond in writing to questions regarding their observations and what orders they might give; a training simulation, in which each can-

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[18] For example, Questions 126 and 130 require knowledge of the diameter of certain water mains and of the number of pumping stations in St. Louis, and Questions 62 and 63 require knowledge of certain elements of window and stair construction. Captain Austin testified that these are not items of knowledge which are necessary for the performance of a fire captain's duties. Examples of questions of which technical criticism were made include Question 90, which refers to the phases of a fire in terms that Captain Austin testified are not commonly used by fire captains, and Question 86, which contains double negatives that make it difficult to comprehend.

didate prepared and presented an informational lecture, similar to one he might give at the firehouse, from printed materials given to him; and an interview simulation, in which each candidate, playing the role of a fire captain, interacted with a person playing the role of a firefighter involved in a personal confrontation with another firefighter. In each of the second two simulations, the candidates were physically observed by three assessors who later conferred to evaluate the candidates.

The fire scene simulation is also a paper-and-pencil test which is far removed from the content and context of the candidate's actual work behavior. To justify the use of this portion of the examination as a ranking device, St. Louis is again required to demonstrate "from empirical evidence either that mastery of more difficult work behaviors, or that mastery of a greater scope of knowledge corresponds to a greater scope of important work behaviors." Question and Answer No. 62, 44 Fed.Reg. 12,005 (1979). Once again, we find no such empirical evidence in the record.

Further, the interpretations of the Guidelines specifically discuss the content validity of a paper-and-pencil test which is intended to replicate work behaviors. Question and Answer No. 78 provides that

> [p]aper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper and pencil form (*e.g.*, editing and bookkeeping). Paper-and-pencil tests of effectiveness in interpersonal relations (*e.g.*, sales or supervision), or of physical activities (*e.g.*, automobile repair) or ability to function properly under danger (*e.g.*, firefighters) generally are not close enough approximations of work behaviors to show content validity.

44 Fed.Reg. 12,007 (1979).

The fire scene simulation was a paper-and-pencil test that required written answers to questions about a slide presentation. It was intended to replicate the work behaviors which a fire captain would undertake in response to the scenes depicted in the slides. The test sought to measure the candidate's ability to observe the situation depicted in the slides and to decide on the correct course of responsive action, including his projected physical actions, his supervision of the firefighters under his command and his ability to deal with the dangers of the situation. It seems to fall squarely within the scope of Question and Answer No. 78 as a test which is not a close enough approximation of a work behavior to show content validity. Once again, this outcome is supported by logic and reason. The fire scene simulation, like the multiple choice examination, cannot avoid testing the candidate's proficiency in the written exercise of verbal skills which is certainly not a critical or necessary job behavior for a fire captain. The candidates may be very proficient at assessing the scene of a fire and issuing the appropriate oral orders but ineffectual in communicating those orders in writing. It may be that such a simulation test requiring oral responses could be shown to be valid by a content validity study.[19]

The appellants also criticize two aspects of the validity of the administration of the assessment center portion of the examination. First, they note that each candidate was observed for a very short period of time. The candidates were not observed at all during the fire scene simulation and were observed for a total

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[19] The Guidelines provide that the validity of a selection procedure may be shown by criterion-related validity studies, content validity studies or construct validity studies. 29 C.F.R. §1607.5 (1979). Here, the City did not rely on criterion-related studies or construct studies but attempted to establish content validity. As noted above, the circumstances of a multiple-choice examination are so dissimilar from the work situation as to make it impossible to establish job relatedness through a content validity study. Similarly, requiring written answers to the simulation test questions tends to vitiate any showing of content validity.

of only about thirty minutes during the other two exercises. We consider this to be a substantial criticism, especially considering the Guidelines' requirement of additional evidence to validate a procedure for ranking candidates, rather than for ascertaining minimum competence. Second, they criticize the assessor's role in the administration of the examination. They argue that the steps taken to assure the thoroughness of the training of the assessors and uniformity of evaluation among the various assessor groups was not sufficient.[20] These arguments are not without merit. The Validation Report filed in December, 1978, anticipated the use of fifty to sixty assessors for whom at least three to four days of training would be necessary to assure standardization of assessment. In fact, seventy-eight assessors were used. Those assessing the interview and training simulations received only two days of training, and those assessing the fire scene received one day of training.

During this training, twenty-six assessors participated in an exercise designed to demonstrate the reliability of their scores. Although the district court was persuaded by the results of this exercise, we are not. The raw data show substantial variance among the ratings given by the assessors in the exercise. The statistical coefficients of correlation derived by St. Louis from this exercise give an incomplete picture of the reliability of the procedure. First, the coefficient does not measure the differences in scores given by the assessors, but measure only the correlations in their relative ratings. For example, one assessor might give three scores to three individuals—a four and two fives—and another assessor might give scores of one, two and two. The analysis used to produce the coefficients of correlation

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[20] Each assessor evaluated sixteen candidates, and three assessors simultaneously evaluated each candidate's performance on the simulation. Each group of three assessors met one to three days later to attempt to reach a consensus on the candidate's performance on each portion of the evaluation.

results in those sets of scores correlating perfectly, even though the actual ratings differ. Second, the analysis does not address the reliability of the assessment of the candidate's behavior, but only of the scoring procedure. This missing piece of analysis is an important aspect of the reliability of the assessment center portion of the examination.

Although we share the plaintiffs' concerns over these aspects of the assessment center portion of the examination, we would be hesitant to hold that the district court erred in sustaining the validity of the interview and training portions of the examination. These latter portions more closely comply with the spirit of the Guidelines than does either the multiple choice examination or the fire scene simulation. But these sections do not stand alone. They are a part of an overall selection procedure which we hold to be inconsistent with the Guidelines. We include our comments only for the purpose of guiding the parties in formulating a new selection procedure that will be entirely consistent with the Guidelines.

IV.

EQUITABLE RELIEF

A. *Interim Relief.*

Having held that the appellants are likely to succeed on the merits, we must remand this matter to the district court.[21] Because St. Louis promoted twenty-four firefighters without

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[21]In denying plaintiffs' motion for a preliminary injunction, the district court assumed without deciding that the denial of preliminary relief would constitute irreparable harm. In our view, the plaintiffs have demonstrated irreparable injury as a matter of law. Twenty-three white firefighters have been promoted on the basis of an examination which has not been validated. The promotion of still more firefighters on the basis of the present eligibility list, nearly all of whom would be white, would work a great injustice on the black fire captain candidates whose promotions have been delayed for years. The effects of

awaiting a determination of whether its selection procedure was content valid, the question of the scope of preliminary injunctive relief is a very difficult one. We do not hesitate to require interim relief to ameliorate the effects of the twenty-four promotions, especially in view of the harm that may accrue to the careers of qualified black candidates due to St. Louis's untimely promotions. *See* n. 21 *supra*. However, in light of the already chaotic and demoralized condition of the fire department, we do not feel that the demotion of the twenty-three whites and one black is an appropriate alternative.

The only other available alternative is to require that a number of blacks be promoted to the position of fire captain and that their effective promotion date be the same as that tof the twenty-four previously appointed captains. While such promotions will undoubtedly also contribute to the tension within the department, we feel that the history of discrimination against blacks in the St. Louis Fire Department requires such affirmative relief. *Firefighters Institute v. City of St. Louis, Mo., supra,* 588 F.2d at 240-241. *See Albemarle Paper Co. v. Moody, supra* at 418; *United States v. City of Chicago,* 573 F.2d 416, 429 (7th Cir. 1978); *United States v. City of Chicago,* 549 F.2d 415, 436-437 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Kirkland v. New York St. Dept. of Correctional Serv.,* 520 F.2d 420, 429-430 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976).

We next must determine the number of black firefighters to be promoted to fire captain and the standard by which those to be promoted will be selected. Although there is no ideal solution, it appears that the best solution is to require St. Louis to

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these continual delays in the promotions of blacks in the department do not end at the fire captain position. At oral argument, counsel for the United States pointed out that an additional five years of service is required as a prerequisite for eligibility for promotion to the battalion chief position. Since the promotional examination for that position is given fairly infrequently, any delay in the promotions of blacks will adversely affect their chances of further advancement in the department.

immediately promote eight additional black firefighters to the position of fire captain. The promotion of eight additional black firefighters will bring the percentage of black fire captains to 16.6%. which will be an important step towards equating the proportion of black fire captains to that of black firefighters in the department.[22] There is also no ideal solution to the question of which black firefighters should receive these promotions. In our view, the assessment center portion of the examination comes the closest to comporting with the Guidelines and would, thus, be the fairest basis for the selection of the eight black firefighters.

B. *Longer-Term Relief.*

In Section III of this opinion, we held that St. Louis had not established the content validity of its examination. Although the district court heard the evidence on a motion for preliminary relief, the parties presented, and the court considered, exhaustive evidence contesting and supporting the issue of validity. We are not aware of any excluded evidence in support of validity which would be brought forward in the final hearing on the merits of the action. It appears that the district court viewed its decision as a final determination of the merits of the action. In light of these facts, we are inclined to consider our opinion dispositive of the question of validity. If, however, the district court is convinced that St. Louis can offer additional, noncumulative evidence to prove the validity of the examination under this Court's interpretation of the Uniform Guidelines, the district court may receive such evidence and make its decision on the merits of the case on the entire record. If not, however, St. Louis has no recourse but to develop a new examination for the position of fire captain which is fully consistent with this

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[22]Presently, 22% of the department's approximately 900 uniformed personnel are black, and 27% of those in the entry-level firefighter position are black.

opinion and the Guidelines, and to do so promptly. The United States and FIRE are obligated to participate with St. Louis in developing such an examination. FIRE has a further obligation to encourage its members to participate actively in the formulation of a valid examination. It would be highly inappropriate for FIRE to "lie in the weeds" until the results of a new examination are known. As we have indicated earlier, their participation in the preparation of an examination does not bar their right to contest the validity of the examination if it proves to have an adverse impact.

All of the parties and their experts should work together to formulate an examination that will be fully consistent with the Guidelines and this opinion. The district court should, upon the request of FIRE and the white firefighters' organization, require St. Louis to pay a reasonable fee to experts who can assist each of the groups in the preparation of a valid examination.

This leaves yet another question for our determination. St. Louis stated at oral argument that sixty-two vacancies presently exist in the fire captain position, and fifty-eight additional vacancies are predicted to occur over the next two years.[23] St. Louis has filled twenty-four of the sixty-two present vacancies, and we have required it to fill eight more in this opinion.

St. Louis has predicted additional problems with department morale if promotions are made from an examination which has not been validated, and we share its concern over this possibility. Nevertheless, we believe, for several reasons, that the present vacancies must be filled promptly and at least thirty of those which arise between now and the development of an eligibility list from a properly validated examination must be filled as they occur. First, St. Louis has urged the importance of restoring the

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[23]The number of expected vacancies in the position in the near future is greater than usual because of a recent change in the department's retirement rules.

department to full strength, stressing that the efficiency of its firefighting services has been jeopardized by the lack of permanent fire captains. Second, as we previously stated, permitting additional delays in the promotional process will increase the harm which will accrue to black candidates by delaying their possible promotions to a higher rank. Third, a field of candidates eligible for promotion exists because all the firefighters who completed the assessment center portion of the examination had met the department's requirement of five years' satisfactory service ("an average rating of 'Adequate' or above on the most recent Service Rating") as a firefighter or fire prevention inspector. Moreover, all of the persons who took the assessment center portion of the examination had received a passing frade in the multiple-choice portion of the examination. Fourth, we suspect there has been a certain amount of foot-dragging by St. Louis,[24] which has benefited financially by leaving many of the positions of fire captain vacant and using firefighters to perform the fire captain's duties. Fifth, we feel that the new examination can be prepared, given and graded before more than thirty additional vacancies occur.

We, therefore, feel that the only satisfactory solution to this problem lies in the immediate promotion of firefighters to fill the existing vacancies, and to fill the first additional thirty vacancies as they occur. St. Louis must fill these vacancies on the basis of one black firefighter for each two white firefighters that are promoted to the position of fire captain.[25] These

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[24]We extensively discussed the City's recalcitrance in our last opinion, *Firefighters Institute v. City of St. Louis, Mo.*, 588 F.2d 235, 240-241 (1978), *cert. denied*, 99 S.Ct. 3096 (1979).

[25]If all these promotions are made on this basis, blacks will hold approximately twenty-six percent of the fire captain positions.

firefighters are to be chosen for promotion on the basis of their rank on the assessment center portion of the examination.

V.

SUMMARY

The district court's order of June 2, 1979, is vacated and the matter is remanded to the district court, which shall take the following action:

1. It shall order the City of St. Louis to promptly appoint to the position of fire captain those eight black firefighters who received the highest scores on the assessment center portion of the examination, with effective promotion dates of April 30, 1979.

2. It shall order St. Louis to promote firefighters to fill the remaining thirty existing vacancies and the first thirty additional vacancies that occur prior to a final resolution of this matter in accordance with Section IV of this opinion.

3. It shall promptly determine whether it will receive additional evidence of the validity of the examination under the Guidelines.

4. If it decides it will not receive additional evidence of the validity of the examination, it shall

> (a) order the parties and intervenors to proceed to promptly develop a valid examination; and
>
> (b) require St. Louis, on the request of FIRE and the intervenors, to make reasonably sufficient funds available to FIRE and the intervenors to permit expert assistance for each group.

5. If it decides it will receive additional evidence of the validity of the examination, it shall hold its hearing on this issue as

soon as practicable. If it then determines that the examination is invalid, it shall enter an order in conformance with paragraph 4 above.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74 C 30 (3)

Firefighters Institute For Racial Equality, et al.,
Plaintiffs,

vs.

City Of St. Louis, Missouri, et al.,
Defendants.

No. 74 - 200 C (3)

United States Of America,
Plaintiff,

vs.

City Of St. Louis, et al.,
Defendants.

ORDER

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that plaintiffs' application for preliminary injunction be and is denied.

IT IS FURTHER ORDERED that the temporary restraining order, previously entered herein, be and is dissolved.

/s/ John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: June 4, 1979.

MEMORANDUM

This matter is before the Court upon the application of plaintiffs for a preliminary injunction prohibiting defendants from promoting any individual to the position of fire captain based on the results of the 1979 examination for said position. On May 15, 1979, this Court issued a temporary restraining order prohibiting promotions. On May 22, 1979, the temporary restraining order was extended, for good cause shown, pending completion of the introduction of evidence relating to the validity of the examination in question. Rule 65, Federal Rules of Civil Procedure.

Originally, this action was brought by black firefighters and the United States Department of Justice, alleging racially discriminatory practices in the St. Louis Fire Department. Pursuant to the mandate of the appellate court, *Firefighters Institute for Racial Equality* v. *City of St. Louis,* 549 F.2d 506 (8th Cir. 1977), the matter was remanded to this Court in part to exercise continuing jurisdiction over the cause pending development of a valid promotional examination. Following remand, various orders of this Court were issued which are relevant herein. Particularly noteworthy are the following portions of orders of this Court:

> IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the City of St. Louis utilize best efforts to develop a properly validated examination for the position of fire captain by January 1, 1979. *The Court shall assist in the expedition of resolving any parties' objections to said examination.* December 19, 1978 order issued herein. [emphasis added]
>
> If defendants wish to assert the validity of an examination, they shall submit to counsel for all parties at least sixty days prior to any intended use, evidence of the validity of the elements of the process, including a copy of the validation study and all underlying documents or data concern-

> ing the development of the selection process and its validity. *If the parties are unable to agree upon the validity of the process, the process shall not be utilized unless and until the Court determines, upon motion and such evidentiary hearing as it deems appropriate, that the process has been properly validated.* January 26, 1978 order issued herein. [emphasis added]

Notwithstanding these explicit directives, plaintiffs chose to ignore the procedure outlined by the Court. Plaintiffs did not contest the examination prior to its administration. Instead, defendant incurred the expense of its administration, estimated at over $20,000.00. Examination scores were computed and posted. Not until promotions were about to be made, and after expectations of promotions of individual firefighters had been raised, did plaintiffs seek to contest the validity of the examination process.

Sadly, the parties have hardened their attitudes rather than conscientiously working together toward a common goal - the finest possible firefighting units for the City of St. Louis. There have been letters to the newspapers and to this Court which approve as well as criticize the written portion of the Assessment Center portion of the examination. There have been suggestings of cheating, although the evidence offered did not reveal any racial connection with respect to the alleged cheating. Tensions have been greatly exacerbated. Over and above all of this, there is a serious problem. The development, administration and evaluation of an examination requires time, which the St. Louis Fire Department can no longer afford if it is to properly protect the citizens of the city of St. Louis. The testimony of the Chief of the St. Louis Fire Department, Charles Kamprad, as well as that of Captain Daniel Austin, reveal widespread problems with morale. Captain Austin stated that these problems resulted from the examination process and the posting of scores with resulting expectations on the part of certain firefighters who anticipated promotions, and disappointment on the part of those

who did poorly. Chief Kamprad testified as to the impact of the unfilled positions not only upon morale but upon the efficiency of the department as a whole. There are approximately 55 vacancies at the present time in the position of fire captain. Chief Kamprad estimated that there would be 120 vacancies during the next two years, the life of the promotional list prepared as a result of the 1979 examination. He said morale was lower than he had seen it in many years and cited instances of the effect of this in fighting fires.

The issue to be decided by this Court at this juncture in the proceedings is whether plaintiffs have established "a clear showing of probable success *and* possible irreparable injury" based upon plaintiffs' claim that the examination was not properly validated. *Checkers Motor Corporation* v. *Chrysler Corporation,* 405 F.2d 319, 323 (2d Cir. 1969) (emphasis in original). See also *Dino DeLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.,* 336 F.2d 373 (2d Cir. 1966); *American Smelting and Refining Company* v. *Pennzoil United, Inc.,* 295 F.Supp. 149 (D.Dela. 1969) adding the factor of balance of hardships. The Court will assume, without deciding, that promotions based upon an invalid examination having a disparate impact sufficiently establishes possible irreparable injury.

The evidence adduced by the parties revealed the following: the promotional examination consisted of a written portion and an Assessment Center portion. The written portion was weighted 30% of the final grade and the Assessment Center score constituted 70%. The grand mean ratings on the Assessment Center portion of the examination were as follows:

Black applicants: 2.864

White applicants: 2.865.

Of the 404 applicants who underwent the Assessment Center portion of the examination, 56 or 13.86% were black. Of the top 100 scores, 10 applicants or 10% were black. These results

fail to reveal a disparate impact upon black applicants. The statistical difference between the percentage of applicants who were black and the percentage of applicants scoring within the top 100 places is minimal. In view of this minimal difference, and in light of the small statistical pool, *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975), the Court concludes that there is no disparate impact. See *Moore* v. *Southwestern Bell Telephone Company*, ____ F.2d ____, 19 E.P.D. ¶9134 at page 6892 (5th Cir. 1979) in which the court stated that "a 7.1% selection differential between black and white applicants does *not* evidence the required disproportionate impact needed to make a *prima facie* case of discrimination". [emphasis in original]

A disparate impact did result, however, from the written portion of the examination. Of the 429 applicants who took the written portion, 65 or 15.2% were black. While 97.8% of the white applicants passed the written portion, only 87.7% of the black applicants did so. Because the scores achieved by white and black applicants on the Assessment Center portion revealed no disparate impact, the effect of the written examination, although only 30% of the total score, on the final ranking of candidates resulted in a disparate impact upon black applicants. Thus, of the top 100 final scores, only 7 or 7% were black.

The Court therefore concludes that plaintiffs have established a prima facie case of the examination's discriminatory impact. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Thus, the burden shifts to defendants to establish the validity, or job relatedness, of the examination process. *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

Validation of an examination process can be accomplished in a variety of ways.

> The preferred method of test validation is criterion-related or empirical validity, which includes what are referred to as the predictive and concurrent methods of validation.

> Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison of their relative scores and relative performance on the job.
>
> An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job. *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission of the City of New York,* 360 F.Supp. 1265, 1273-74 (S.D. N.Y. 1973), *modified,* 490 F.2d 387 (2d Cir. 1973).

This Court has previously concluded that content validation was and is the only feasible approach herein. *United States* v. *City of St. Louis,* 410 F.Supp. 948 (E.D.Mo. 1976), *rev'd in part,* 549 F.2d 506 (8th Cir. 1977). See also *Vulcan Society of New York City Fire Department, Inc., supra; Commonwealth of Pennsylvania* v. *Glickman,* 370 F.Supp. 724 (W.D.Pa. 1974); *Kirkland* v. *The New York State Department of Correctional Services,* 374 F.Supp. 1361 (S.D.N.Y. 1974), *modified,* 520 F.2d 420 (2d Cir. 1975). The evidence adduced at the hearings held in connection with the present application for injunctive relief reaffirms this conclusion. All of the parties seem to concede this point.

In order to establish that the examination herein has content validity,

> ... defendants must demonstrate not only that the knowledge, skills and abilities tested for by [the examination] ... coincide with some of the knowledge, skills and abilities required to successfully perform on the job, but also that 1) the attributes selected for examination are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighted to reflect the relative importance to the job of the attributes for which they test; and 3) the level of difficulty of the examination matches the level of difficulty for the job. *Kirkland, supra* at 1372.

Because a written examination could not accurately assess certain of the skills required of the position, the examination included not only a paper-and-pencil examination but also an Assessment Center portion in which applicants were required to respond to simulated situations. This method was suggested by plaintiffs' expert, Dr. Richard Barrett at the prior trial and approved by the United States Court of Appeals for the Eighth Circuit in its February 2, 1977 decision herein.

The items to be included on the written portion of the examination as well as on the Assessment Center portion were determined after development of a thorough job analysis. An expert panel of fire personnel was constituted and assisted in the preparations of both portions of the examination. Two of the four panel members were black. The Court notes, at this juncture, that black fire personnel, although encouraged and invited to participate, were unwilling to do so. Captain Austin participated as a member of the expert panel only when directly ordered to do so.

Task questionnaires were completed. Each task was rated on a number of factors and then ranked in order of importance. Each task was linked to the knowledge, skills and abilities ["KSA"] to which it related. Each KSA was then rated on the

basis of different factors and ranked in terms of importance. There can be no doubt as to the thoroughness of the job analysis.

The list of KSAs was used to construct the examination. The expert panel determined which KSAs could be tested for by a written examination. Based thereon, test items were prepared by Edmond Knowles, an employee of the Department of Personnel of the City of St. Louis and an expert in the development and validation of examinations, members of his staff, and the expert panel of fire personnel.

The expert panel linked the KSAs to the test items. They rated the difficulty of each item in accordance with the difficulty of the position. Similar care was taken in connection with the Assessment Center portion of the examination, concerning the items to be included for testing, the simulations developed therefor and the reliability of the raters.

A vast number of statistical analyses were performed to determine the reliability of both the written examination and the Assessment Center examination. These analyses consistently supported the reliability of the examination.

The criticisms levelled by plaintiffs' expert, Dr. Richard Barrett, and by Captain Austin, are insufficient to warrant the conclusions that the examination was not valid. Dr. Barrett, concededly an expert in these areas, testified that no matter how extensive and thorough the preparation of an examination might be, it could still prove to be invalid based upon post-administration statistical analysis. He stated that even he might not be able to construct an examination which would withstand validation scrutiny. The ease with which Dr. Barrett attacked certain portions of the examination and the general construction of the examination leads this Court to observe that any examination can be picked apart in "Monday morning quarterback" fashion.

The Court would observe that Dr. Barrett is an expert at this "picking apart" process. Yet, he admittedly has very limited experience in *constructing* examinations. He has testified in litigation concerning 65 examinations and found that only two of those examinations passed muster. Of course, it is possible that 63 of the examinations truly did fail to meet the validation requirements of the law. Thus, his litigation statistics may be meaningless but they do point up Dr. Barrett's ability to criticize examinations. The Court would state that Dr. Barrett is an intelligent person, a qualified man in the field. His honest nature, as indicated above, caused him to concede that even he might not be able to construct an examination for the position of fire captain that would prove valid under the law.

The City of St. Louis, through the efforts of Edmund Knowles, also an expert in the field, made every effort to produce a valid examination, a fact conceded by plaintiffs herein. The Court finds that defendants undertook to follow the mandate of the United States Court of Appeals for the Eighth Circuit and the orders of this Court in developing a fair testing procedure. Acting in good faith, defendants developed a new examination. Help was sought from fire personnel, the obvious true experts in this area. Knowles did all that could be done to eliminate any possible bias in the examination process.

It is not the job of this, or any other Court to tell experts how to write an examination. Even having to determine the question of validity gives this Court pause. Two experts presented this Court with diametrically opposed opinions, based on diametrically opposed statistical analyses, of the identical data. The area in which these experts testified is not an area in which most judges have great expertise.

It is this Court's conclusion that the criticisms levelled at the examination simply do not defeat the overwhelming evidence that this examination was valid. The evidence also failed to support the claim that racially discriminatory appointments to the

position of acting captain, or senior man, affected test results. The statistical evidence failed to establish a correlation between examination scores and such temporary appointments.

Based upon the record presented to this Court, the court must conclude that plaintiffs have not fulfilled their burden of establishing probable success on the merits. Although the examination resulted in a disparate impact upon black applicants, it was sufficiently validated. Thus, defendants have fulfilled their obligations under the law.

The appllication for preliminary injunction will be denied, and the temporary restraining order dissolved.

/s/ John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: June 4, 1979.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1294

Firefighters Institute for Racial Equality, et al.,
Appellants,

v.

The City of St. Louis, Missouri,
a Municipal Corporation, et al.,
Appellees,

and

Joseph Blessing, et al.,
Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 11, 1978
Filed: November 29, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and VAN SICKLE,* District Judge.

HEANEY, Circuit Judge.

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* BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

This is the latest appeal in protracted litigation, challenging the employment practices of the St. Louis Fire Department. Members of the Firefighters Institute for Racial Equality (F.I.R.E.) and several named plaintiffs brought this action in January, 1974, against the City of St. Louis and various City officials, alleging racial discrimination against blacks in the hiring and promotion of personnel in the St. Louis Fire Department. F.I.R.E. also challenged the existence of racially segregated eating arrangements, or "supper clubs," maintained by white employees in the City's firehouses. The action was brought under 42 U.S.C. §§1981, 1983 and 2000e *et seq*. The United States subsequently filed suit under §2000e *et seq* as well, charging the City with the "pattern or practice" of discrimination in violation of Title VII of the Civil Rights Act of 1964. The cases were consolidated for trial. The intervenors, representing a class of non-black employees and candidates for employment in the Fire Department, were permitted to intervene on behalf of the City.

On April 9, 1976, the District Court entered an order in which it found for the City on all counts. This order was amended by a nunc pro tunc order issued by the District Court on June 28, 1976. In that order, the court found that the examination which the City had used for the entry level position of firefighter had a disparate racial effect and was not validated.[1] The order required that the City attempted to achieve a fifty percent hiring

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[1] The mean scores for blacks and whites on the written examination given for the entry level position of firefighter in 1974 were approximately 56.70 and 71.95, respectively. The cut-off score used in 1974 eliminated approximately fifty-one percent of the black applicants and twenty-five percent of the white applicants. The parties stipulated that although the population of St. Louis is approximately forty percent black, only eleven percent of the uniformed personnel employed in the St. Louis Fire Department as of November 30, 1974, were black.

rate of blacks for firefighter positions over the next five years. F.I.R.E., the named plaintiffs and the United States appealed.[2]

On appeal, this Court affirmed the District Court with regard to the City's use of a particular examination for the position of battalion chief and with regard to the City's refusal to promote a particular individual, George Horne. *Firefighters Institute, Etc.* v. *City of St. Louis,* 549 F.2d 506, 515-516 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977). We found, however, that the examination administered in 1974 for promotion to the position of fire captain had a racially disparate effect to the disadvantage of minority candidates, and that the City had failed to demonstrate that the test was sufficiently job related to justify its use. *Id.* at 509-513. We remanded the case to the District Court with directions that it maintain continuing jurisdiction until a valid examination is devised by the parties and approved by that court. *Id.* at 513-514. We also found that the maintenance of segregated supper clubs by white employees in the City's firehouses violated Title VII, and directed the District Court, on remand, to supervise the promulgation of regulations by the Fire Department which would prohibit the use of City's facilities for such activities. *Id.* at 515.

On October 21, 1977, the District Court entered an order which permanently enjoined the City from engaging in any practice with respect to promotion to the rank of fire captain which had the purpose or effect of discriminating against any black applicant on the basis of race. The order permanently enjoined the use of the 1974 test results as the basis for either permanent or temporary (acting) appointments to the position of fire captain, except as provided therein. It enjoined the City

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[2] The United States appealed only that portion of the District Court's order denying relief as to a promotional examination which had been given for the position of fire captain, and as to the maintenance of segregated "supper clubs" by white employees in the City's firehouses. No appeal was taken by any party as to the firefighter examination.

from making any permanent appointments to the position of fire captain unless made on the basis of a valid examination or, pending the development of a valid examination, unless fifty percent of such vacancies were filled with qualified blacks. The order provided that all black applicants who passed the 1974 test and who were on the 1974 eligibility list were to be deemed qualified during this interim period. In the event that all blacks on that list were offered employment and the defendants desired to make further permanent appointments during this interim period, the parties were directed to determine an appropriate basis for the appointment of black firefighters who are otherwise qualified for promotion under time-in-grade and efficiency rating standards.[3] The order also provided that, to the extent practicable, the fifty percent goal established for permanent appointments during the interim period should also be followed for temporary appointments during this period. The court also directed the City to promulgate regulations to assure that any segregation in communal eating arrangements in firehouses ceased.

On January 26, 1978, the District Court entered an order setting aside its order of October 21, 1977. The court expressed its "deep disappointment with the intransigence of all parties and their continued unwillingness to conscientiously and industriously seek an acceptable procedure for filling the numerous vacancies existing in the position of Fire Captain, which vacancies should be filled if the safety of the persons and properties of St. Louisans is to be assured." The court then reiterated the provisions of its previous order, with the exception of those provisions governing the appointment of individuals to fire captain positions pending the development of a

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[3] Basic qualifications for promotion to the position of fire captain have been five years of experience as a firefighter, satisfactory service ratings and a satisfactory score on the written examination administered in 1974.

valid examination. Instead of requiring that any such interim appointments to permanent positions be made in accordance with a fifty percent black promotional goal, as specified in the previous order, the revised order provides that such appointments may be made as follows: A racially identified list of all firefighters, who have served five years or more as a firefighter, is to be drawn up in the order of departmental seniority. The black firefighter with the most seniority and the white firefighter with the most seniority will then be offered the opportunity to be evaluated by the Assessment Center technique.[4] The individual receiving the higher evaluation is then to be promoted, regardless of his race. The firefighter who is not promoted remains eligible for the next fire captain vacancy and is evaluated along with the black firefighter and the white firefighter with the next highest seniority. The two unsuccessful candidates for that vacancy remain eligible for the next vacancy, and so on. The order contains no provisions governing temporary appointments to fire captain positions, except for a general prohibition against the use of the 1974 test results as the basis for any appointments to the position of fire captain, whether on a temporary or permanent basis.

I.

F.I.R.E. contends that the remedy contained in the District Court's order of January 26, 1978, is inadequate on several

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[4] The Assessment Center technique, lauded by both F.I.R.E. and the City's expert witnesses, is a selection procedure which uses individual and group exercises to simulate job responsibilities while assessors evaluate a candidate's performance. *Firefighters Institute, Etc.* v. *City of St. Louis,* 549 F.2d 506, 513 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977). This Court has previously recognized the potential of the Assessment Center technique as a means of evaluating supervisory skill. *Id.*

grounds.[5] It contends that the procedure provided in the order for the promotion of individuals to permanent fire captain positions pending the development of a valid examination is inadequate in that it fails to guarantee that any black firefighters will be promoted. It argues that elimination of the effects of past discrimination requires the imposition of a fifty percent black promotional goal, similar to that provided in the District Court's previous order of October 21, 1977. F.I.R.E. also contends that since the firefighters who serve as acting fire captains gain valuable supervisory experience which will given them a competitive advantage on any test for fire captain positions which is developed later, these assignments should also, as far as practicable, reflect a fifty percent black ratio.

The City responds, first, that since the appellants adduced only general statistical information as to the disparate impact of the 1974 examination upon blacks,[6] there is no evidence of racial discrimination which would justify the imposition of a racial goal for promotions to fire captain positions. It contends that no violation of Title VII has been established since there is no evidence that any firefighters, white or black, have received promotions on the basis of the 1974 examination results, and since there is no evidence that any black firefighters would have been promoted but for the invalid test.

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[5] The United States does not appeal from the District Court's order.

[6] The adverse effect of the 1974 examination on black candidates for fire captain is detailed in our prior opinion. The mean score for blacks was 69.72; for whites, it was 76.59. Of those blacks taking the exam, 25.5 percent received a passing score; 43.6 percent of the whites passed. *Firefighters Institute, Etc.* v. *City of St. Louis, supra* at 510 n.4.

The City's contention that no violation of Title VII has been established which would permit an order requiring that qualified blacks be appointed to acting or permanent fire captain positions is without merit. We have previously held that the promotional examination for fire captain, which was administered by the defendants in 1974, had a racially disproportionate impact on blacks and was not job related. *Firefighters Institute, Etc.* v. *City of St. Louis, supra* at 509-514. The use of a testing device, although neutral on its face, which has a racially disparate impact on members of minority groups and which has not been properly validated by the employer, constitutes a discriminatory act for which Title VII affords a remedy. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 806 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971). The Supreme Court has recently approved of the use of racial preference as a means for remedying constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *University of California Regents* v. *Bakke,* 57 L.Ed.2d 750, 778 (1978). *See also Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1342-1343 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3780 (June 20, 1978); *Carter* v. *Gallagher,* 452 F.2d 315, 329-330 (8th Cir.) (en banc), *cert. denied,* 406 U.S. 950 (1972), and cases cited therein. Other courts have upheld the use of preferential relief in hiring or in the making of promotions after finding that an employer had engaged in a discriminatory testing practice similar to that engaged in here. *See, e.g., United States* v. *City of Chicago,* 549 F.2d 415, 436-437 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977); *Davis* v. *County of Los Angeles, supra; Boston Chapter N.A.A.C.P., Inc.* v. *Beecher,* 504 F.2d 1017, 1026-1028 (5th Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Serv. Com'n,* 490 F.2d 387, 398-399 (2d Cir. 1973); *Commonwealth of Pennsylvania* v. *Flaherty,* 404 F.Supp. 1022, 1030-1031 (W.D. Pa. 1975); *Western Addition Community Organization* v. *Alioto,* 369

F.Supp. 77 (N.D. Cal. 1973), *appeal dismissed as moot,* 514 F.2d 542 (9th Cir.), *cert. denied,* 423 U.S. 1014 (1975).

The City's contention that preferential relief is unavailable because there is no evidence that any specific black candidate for promotion would have been promoted but for the invalid test is likewise without merit. In *Teamsters* v. *United States,* 431 U.S. 324 (1977), the Supreme Court stated:

> When the Government seeks individual relief [in a Title VII case] for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case [*Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976)]. As was true of the particular facts in *Franks,* and as is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision-making.

Id. at 361-362.

The City next contends that even if there has been a violation of Title VII which would make the imposition of preferential relief a possible remedy, the District Court did not err in failing to impose such a remedy in this case.

Title VII has vested broad equitable powers in the federal courts in order "to make possible the 'fashion[ing] [of] the most complete relief possible.' " The federal courts have " 'not merely the power but [also] the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Co. v. Moody, supra* at 418, 421. *Accord, Teamsters v. United States, supra* at 364-365.

We believe that the record in this case, viewed as a whole, provides ample justification for preferential relief such as that imposed by the District Court in its order of October 21, 1977. This litigation was begun in January, 1974, almost five years ago. Since that time, the number of black fire captains in the St. Louis Fire Department has decreased from four to one.[7] Approximately fifty of the 180 permanent fire captain positions in the Fire Department are now vacant. The City has known since October 3, 1977, when its petition for certiorari was denied, that a nondiscriminatory method for the selection of fire captains would have to be devised. Despite this knowledge, little progress has been made in developing such a method. Meanwhile, the City has apparently determined not to make any permanent appointments to fire captain positions,[8] notwithstanding the fact

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[7]Of the 180 persons holding the rank of fire captain as of November 30, 1974, a total of four (2.2%) were black. Since that time, one of these black fire captains has been promoted and two have retired, leaving only one black individual now holding the rank of fire captain.

[8]Intervenors state in their brief that the only reason they did not appeal from the District Court's order of January 26, 1978, was the assurance of the City's administration that under no circumstances would promotions be made pursuant to the District Court's interim plan. The City, in its brief, concedes this intention, stating "[s]ince the promotional procedure suggested by the Court, based upon seniority and the assessment center, was not acceptable [to] any of the parties and because of the fact that no voluntary agreement was reached between the parties, the City is now proceeding with the third alternative * * * and is developing a new promotional exam."

that twelve black firefighters qualified for promotion even on the basis of the discriminatory examination administered in 1974, and that since the filing of this suit, forty-three additional black firefighters have attained the necessary five-year service requirement. The net result of the City's inaction is the continuation of a policy of discrimination against those black candidates for promotion who have been the victims of discrimination in the past. The City's recalcitrance cannot be justified on the basis of operational considerations as the failure of the City to make permanent fire captain appointments has caused a deterioration in the Department's morale and impaired its efficiency.[9]

We cannot ask those black firefighters who have been the victims of discrimination to wait forever for the vindication of their rights. In light of the City's apparent decision not to make any permanent appointments pending the development of a valid examination, and of the fact that the development of such an examination rests in the first instance with the City, we do not believe that mere reinstatement of the provisions of the District Court's order of October 21, 1977, as requested by F.I.R.E., will afford any greater relief than that afforded by the court's order of January 26, 1978, since under neither order is the City required to make any permanent appointments to fire captain positions. We believe that nothing short of an affirmative order requiring the immediate promotion of those black firefighters who are unquestionably qualified is necessary in

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[9]Deputy Fire Chief Allen Brandenmeyer testified that the failure of the City to make appointments to the rank of fire captain has caused deterioration in the morale of the Fire Department, impairing the Department's efficiency in emergency situations. Failure to make promotions has also resulted in a reduction in the number of fire inspections made in commercial and residential areas, and those acting captains who have made such inspections have been handicapped by their lack of apparent authority.

order to redress the rights of those who have been the victims of the City's discrimination.[10]

The City concedes that the twelve black firefighters who passed the 1974 examination are qualified for promotion to fire captain positions. These individuals, if otherwise still qualified , should be offered immediate promotion. Since only one individual now holding the rank of fire captain is black, the addition of twelve black fire captains will increase the number of black fire captains to thirteen, or 7.2 percent of all fire captain positions. We do not think that increasing the percentage of blacks holding the rank of fire captain to 7.2 percent is unreasonable, in light of the fact that eleven percent of the uniformed personnel employed by the Fire Department at the time of trial were black, and that this percentage has undoubtedly increased as the fifty percent black hiring goal for the entry level position of firefighter is implemented. *See United States v. N. L. Industries, Inc.,* 479 F.2d 354, 377 (8th Cir. 1973). In addition to the immediate promotion of the twelve black candidates, the District Court may also, in its discretion, require the immediate promotion of twelve white candidates who are also qualified on the basis of the 1974 examination. Guidelines governing the precise selection of these individuals shall be developed, if necessary, by the District Court.

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[10]We note that other courts have approved of the use of interim preferential hiring or promotional relief under similar circumstances. *See, e.g., United States v. City of Chicago,* 549 F.2d 415, 437 (7th Cir.), *cert. denied,*434 U.S. 875 (1977); *Davis v. County of Los Angeles,* 566 F.2d 1334, 1343-1344 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3780 (June 20, 1978); *Vulcan Soc. of N.Y. City fire Dept., Inc. v. Civil Serv. Com'n,* 490 F.2d 387, 398-399 (2d Cir. 1973); *commonwealth of Pennsylvania v. Flaherty,* 404 F.Supp. 1022, 1029 (W.D. Pa. 1975); *Western Addition Community Organization v. Alioto,* 369 F.Supp. 77, 80 (N.D. Cal. 1973), *appeal dismissed as moot,* 514 F.2d 542 (9th Cir.), *cert. denied,* 423 U.S. 1014 (1975).

Any additional promotions which the City desires to make prior to the development of a valid examination must be made in accordance with the Assessment Center technique, as set forth in the District Court's order of January 26, 1978. Written guidelines should delineate the criteria to be used in evaluating a candidate's performance, and those criteria should be objective to the maximum extent possible. *See Wells v. Meyer's Bakery,* 561 F.2d 1268, 1273 (8th Cir. 1977).

It is undisputed that those firefighters who serve as acting fire captains gain valuable supervisory experience which may give them a competitive advantage on any test for fire captain positions which is developed later. We, therefore, agree with the appellants that these assignments must be made in a manner which does not unfairly disadvantage black candidates for promotion. Evidence adduced at a hearing held on August 4, 1976, indicated that assignments to acting fire captain positions were based in part on the results of the 1974 examination, previously invalidated by this Court. The brief of the intervenors informs us that shortly after the issuance of the District court's order on January 26, 1978, those assigned as acting captains were relieved of that responsibility, and firehouse seniority was insituted as the basis for these positions. The City has confirmed that firehouse seniority is now used. Since this seniority system would inevitably reflect the previous discriminatory practices of the City in the hiring of entry-level personnel, automatic appointment of those firefighters with greatest seniority to acting fire captain positions serves to perpetuate the effects of past discrimination in violation of Title VII. *See Griggs v. Duke Power Co., supra* at 430; *United States v. N. L. Industries, Inc., supra* at 361; *Chavez v. Temple U. High Sch. Dist. No. 218,* 565 F.2d 1087, 1093 (9th Cir. 1977).[11] We, therefore, direct the

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[11]We are not here concerned with a bona fide seniority system which is immunized from a finding of illegality by reason of §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h). *See Teamsters v. United States,* 431 U.S. 324, 355-356 (1977). *Compare*

District Court, on remand, to enter an injunctive decree which requires that assignments to acting fire captain positions reflect a fifty percent black ratio as far as is practicable, pending the development of a valid examination.

The City stated, during oral argument before this court, that it would have a properly validated examination for the position of fire captain developed by January 1, 1979. We have confidence that the District Court will require the City to keep its commitment in this regard.

Upon the development of such an examination by the City, the court shall promptly hear and resolve any objections which any party has to the plan. If any party objects to that court's detrmination, that party shall have ten days in which to file notice of appeal in this Court. An accelerated briefing schedule shall then be arranged with the Clerk of this Court.

We recognize that the affirmative relief which we order today may impinge upon the justified expectations of both black and white firefighters who are as well qualified for promotion as are those twelve black firefighters whose promotion we have ordered. Continued inaction, however, will serve neither to vindicate the rights of those black firefighters who have been the victims of past discrimination nor to give the people of St. Louis the fire protection which they deserve. Federally guaranteed rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously.' " *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). We are confident that the City's expeditious good

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James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352-353 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (seniority system, which was the product of collective bargaining, must be evaluated in the context of the company's extensive unlawful employment practices during the period of the negotiations and its intransigent adherence to segregationist policies, in determining whether it was in fact bona fide).

faith compliance with our mandate will eliminate the necessity for further imposition of such relief and will allow future promotions to be made on a nondiscriminatory basis which is fair to all candidates.

II.

F.I.R.E. next contends that the attorney's fee of $12,500 awarded to F.I.R.E. by the District Court is arbitrary and capricious. It contends that under *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), specific factors must be considered in making an award under §706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k), and that no consideration of these factors is reflected in the District Court's order.

The guidelines for awarding attorney's fees, which are set forth in *Johnson,* have received repeated approval by this Court. *See Allen v. Amalgamated Transit Union Local 788,* 554 F.2d 876, 884 (8th Cir.), *cert. denied,* 434 U.S. 891 (1977). They should be followed. Moreover, the basis of the award of attorney's fees should be set forth in detail so that this Court can adequately review the record. Failure of the District Court to disclose the basis of its award may compel the conclusion that it has abused its discretion. *See Johnson v. Georgia Highway Express, Inc., supra* at 720. In this case, we have independently reviewed the record, however, and have determined that the $12,500 award made by the District Court is adequate compensation in light of the experience of F.I.R.E.'s counsel at the time of trial, the time and labor which we believe should be required for a case of this type, the customary fee for similar legal work in the community, and the other factors listed in *Johnson.* The District Court's denial of the twenty-five percent bonus requested by counsel for F.I.R.E. was also not an abuse of discretion.

We award F.I.R.E. $4,000 for attorney's fees for this appeal.

The order of the District Court is reversed to the extent that it is inconsistent with this opinion. The District court is hereby directed to modify its decree to grant injunctive relief and to permit further proceedings as required by this opinion.

Reversed and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 76-1507 and 76-1663

Firefighters Institute for Racial Equality, et al.,
Plaintiff-Appellants,

v.

City of St. Louis, et al.,
Defendants-Appellees,

United States of America,
Plaintiff-Appellant,

v.

City of St. Louis, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: October 14, 1976
Filed: February 2, 1977

Before Lay, Ross and Stephenson, Circuit Judges.

Ross, Circuit Judge.

In this consolidated action, black firefighters and the Department of Justice allege the existence of racially discriminatory

practices in the St. Louis City Fire Department. In the first action the Firefighters for Racial Equality (F.I.R.E.) and several named plaintiffs represent a class who are presently employees or who seek employment with the St. Louis Fire Department. The United States subsequently filed suit under Title VII of the Civil Rights Act of 1964 seeking redress for a "pattern or practice" of discrimination as well as for individuals not represented by F.I.R.E. Both actions were filed pursuant to 42 U.S.C. §§ 1981, 1983 and 2000e *et seq.* The principal defendant, the City of St. Louis is joined in its argument by the Intervenors who represent class of nonblack employees and candidates for employment in the fire department.

Appeal is taken on a number of issues, but no appeal has been taken with respect to the examination for *firefighter* which is the *entry level* position in the fire department.[1] The F.I.R.E. Appellants do contest the City's promotional practices with regard to the fire captain's exam and the battalion chief's exam. Also charged as unlawful are exclusion of blacks from firehouse eating arrangements known as "supper clubs," and the failure to promote a black individual, George Horne, to a fire captain position. F.I.R.E. also contests the amount of attorney's fees which the district court indicated it would award.

Of these issues, the United States appeals on only two: the promotional exam for *fire captain* and the supper club discrimination issue. This court considers the latter as the principal

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[1] The *firefighter* exam was shown to have had a disparate racial effect and was not validated. *See* nunc pro tunc order 2 (June 28, 1976). The order was entered on June 28 and amended the April 9, 1976 memorandum opinion which had included the parties partial consent decree on the entry level issue. On June 28 the court issued an order pursuant to the stipulation of the parties granting relief similar to the partial consent decree. The June 28 order required defendants *inter alia* to try to achieve a 50 percent hiring rate for blacks in filling vacancies at the entry level over the next five years.

claims, and reverses with respect to them. The district court is affirmed with respect to the battalion chief exam and in the matter of George Horne.

Fire Captain's Examination

The position of fire captain is the first level supervisory job in the St. Louis Fire Department. According to the findings of the district court, fire captains are responsible for the supervision of a group of men and equipment on a particular work shift. The in-service training of the firefighters under his command is a significant part of the fire captain's job. According to the City's validation study, the fire captain leads his company at the fire scene.

Promotion to the fire captain's position is dependent on a composite score developed from three measurements of an individual's qualifications. For candidates on the 1974 eligibility list which is at issue here, the "written test" was given a 45 percent weight as was an "experience and training score." The "service rating" score was weighted as 10 percent of the composite.

Attaining the rank of fire captain is a highly sought-after and competitive goal of both blacks and whites. From the 1974 procedure now under sorutiny a total of 453 persons are seeking the higher position of captain, while only approximately 18 persons are needed to fill vacancies during the two-year life of the eligibility list. The highest ranking black man ranks as number 55 out of total of 189 on the list. As a prerequisite for consideration all applicants for fire captain must have served five years as firefighter.[2]

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[2] F.I.R.E. has alleged that the change of the in-service requirement from five to seven years from 1967 up until 1974, when it was changed back to five years, adversely affected black applicants. However, the change, which was instituted both times on the recommendations of consultants, admittedly affected white candidates as well as black.

The experience and training score, which comprised 45 percent of the total score, is also a function of *length* of service with the fire department. According to the district court, points are awarded for each month of experience with the department. In 1974 all applicants with ten or more years experience received the maximum score of 45 points. Eighty-one percent of those who made the 1974 eligibility list for the captain's position received the maximum number of points for experience and training.

While the experience and training score is largely quantitative, the "service rating" is qualitative, and reflects the individual's last supervisory rating prior to announcement of the written exam. On this measurement of qualification, 93 percent of the persons on the eligibility list received scores in the narrow range between 7.8 and 9.2.

At trial Dr. O'Leary, the City's test analyst and expert witness, testified that these two work-related ratings were included because he felt that experience on the job and the quality of that experience were important factors in evaluating potential fire captains.[3]

It appears that as a practical matter these two scores carry less weight than their assigned value indicates. For many of those 189 persons who made the eligibility list, these two experienced-based scores are closely clustered, making the written exam of much greater weight in determining final rank than the allotted weight of 45 percent.

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[3] Dr. O'Leary also testified that determining the relative *weight* of the three scores was a matter of judgment and he knew of no mathematical or statistical procedure to objectively determine the weight to be accorded each criteria. This opinion was refuted to a certain extent by the plaintiff's expert, Dr. Barrett, who indicated that weighting is best arrived at by some empirical means such as a criterion-related validity study. In any event, it has not been argued on this appeal that the use of an experience and training score or a service score has resulted in a discriminatory impact on black candidates.

It is not disputed here that the 1974 written exam for the fire captain's position adversely affected black candidates as a whole. The district court concluded that the statistical evidence presented established that the test had a disparate impact on blacks.[4]

It is a distinguishing feature of a Title VII cause of action that discriminatory impact suffices to establish a prima facie showing of discrimination. The recent case of *Washington* v. *Davis,* 426 U.S. 229, 239 (1976), establishes that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. However, Congress' statutory standard for Title VII, where discriminatory purpose need not be proved, is unshaken by the *Washington* decision. *Id.* at 246-47.[5]

It is now a familiar principle that Title VII was not meant to preclude the use of testing devices, and that what is forbidden is

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[4] The mean score for blacks on this exam was 69.72; the mean for whites was 76.59. Of those blacks taking the exam 25.5 percent received a passing score; 43.6 percent of the whites passed.

[5] In 1972 Congress amended 42 U.S.C. § 2000e and included state and local governments, such as the City of St. Louis, under the rubric of "employers" subject to that Act. Intervenors in this appeal, citing *National League of Cities* v. *Usery,* 44 U.S.L.W. 4974 (June 24, 1976) have strongly contested Congress' power to dispense with the *intent* requirement in Title VII cases where the state and local governments act as employers. The *Cities* case, *supra,* limiting Congress' power to impose wage and hour standards for state and local employees under the commerce clause, is undoubtedly inapposite. *But see Fitzpatrick* v. *Bitzer,* 44 U.S.L.W. 5120 (June 28, 1976). In any event, the court determines that it need not reach this issue. Counsel for the Intervenors has admitted under the court's questioning the constitutional issue was not raised below.

the controlling use of such tests "unless they are demonstrably a reasonable measure of job performance." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971).

Once a racially adverse impact is demonstrated, the burden of proof shifts to the employer to prove the job relatedness of the exam he has utilized. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). Accepted professional methods of "validating" exams for their job-relatedness are found in the EEOC Guidelines published in 29 C.F.R. § 1607.5 (1975). The Supreme Court has said of these tests validation techniques:

> The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." (Citations omitted).

Albemarle Paper Co. v. *Moody, supra*, 422 U.S. at 431.

Though it has been argued here that the EEOC Guidelines, which refer to the standards of the American Psychological Association (APA), should be considered "guidelines *only*" these standards have often been sanctioned as a means by which courts may professionally evaluate the validity of employment tests when called upon to do so.[6]

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[6] *See, e.g., Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975): "These guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. We think it unwise to depart from these accepted principles at this stage in the development of the law concerning equal employment opportunity." *Id.* at 986 (footnote omitted). *See also, Kirkland* v. *New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975); *Vulcan Soc'y of New York City Fire Dept., Inc.* v. *Civil Serv. Commission*, 360 F.Supp. 1265, 1273 n.23 (S.D.N.Y. 1973).

It is also true that in this case Dr. O'Leary, the City's expert who developed and validated the test, purportedly considered and reviewed the APA and EEOC publications as guidelines in preparing the examination.

Accepted validation techniques under these standards include two forms of criterion-related validity, plus the content and construct validity methods. Criterion-related studies involve the correlation of job performance with success on an examination. *Predictive* validation requires a comparison between an applicant's test scores and subsequent on-the-job performance as an employee; *concurrent* validation methods correlate the test scores of *present* employees vis-a-vis their *present* job performance. *Vulcan Society of New York City Fire Dept.* v. *Civil Service Commission,* 490 F.2d 387, 394 (2d Cir. 1973). These empirical methods are, of course, dependent on statistical correlations as proof of reliability and validity. Content validity, the technique chose by Dr. O'Leary for justification of the fire captain's exam, generally requires that the examination reflect a representative sample of the knowledge or behavior that will be used in performance of the job.

The F.I.R.E.-Appellants have argued on this appeal that a *content* validity study should not have been undertaken by the City and that this type of test should be used *only* when a criterion-related study has proved to be technically infeasible.[7] This argument is now undermined by the Supreme Court's recent observation in *Washington* v. *Davis,* 426 U.S. 229 (1976), that "[i]t appears beyond doubt by now that there is no *single* method for appropriately validating employment tests for their relationship to job performance." *Id.* at 247 n.12 (emphasis added).[8] Although in this court's opinion content validation, *if*

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[7] *See* C.F.R. § 1607.5(a) (1975).

[8] Newly proposed regulations provide that "[f]or the purposes of satisfying these guidelines users may rely upon criterion related validity studies, content validity studies, or construct validity studies * * *." 41 Fed. Reg. 29018 (1976).

properly done, could be an acceptable means of evaluation for the City to undertake, it is no more acceptable than a criterion-related test, especially if such criterion-related test involves concurrent validation testing methods with present fire captains.

Constructing a content valid exam and proof of its validity requires as a first step a thorough analysis of the job to be performed. The district court concluded, and this court does not challenge the finding, that Dr. O'Leary's analysis of the fire captain's job was thorough and complete.[9]

It is in fact the fatal flaw in the validation study that the test Dr. O'Leary devised did not reflect his findings in the job analysis. The captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire cap-

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[9] Twenty-seven fire captains were interviewed in the preparation of this job analysis. Those interviewed were asked to describe the elements of the job and rank their relative importance. Captains were questioned concerning the positive and negative critical incidents of the job, and the essential and desirable qualities of a fire captain.

A pool of questions for the exam were obtained through the International Governmental Personnel Management Association; according to Dr. O'Leary, a series of items tailor-made by the department were also included. Questions on the exam were distributed according the importance of each area of knowledge. The best items were selected after review by several technical and test advisors. *See United States* v. *City of St. Louis,* 410 F.Supp. 948, 954 (E.D. Mo. 1976).

[9]Dr. Barrett's main objection to the job analysis was that in his opinion the descriptions of job activities and skill levels were incomplete. He also acknowledges, however, that the 27-person sample interview technique, and cataloging of information used by Dr. O'Leary were reasonable methods. Considering the district court's evaluation of the two experts' credibility, this court will not disturb the lower court's conclusions about the *job analysis.* Compare the job analysis in this case with the cursory preparation disapproved in *Vulcan Soc'y of New York City Fire Dept., Inc.* v. *Civil Serv. Comm'n, supra,* 360 F.Supp. at 1275.

tain, that of supervisory ability. From the interviews conducted for the job analysis, the City's expert determined that almost 43 percent of a fire captain's time was spent in supervision, a higher percentage of time than on any other single element. Of the six tasks ranked as the "most important," supervision was fourth. There was no attempt to test supervisory skills prior to selecting the new captains. The City admits this lack of proper testing for supervisory ability but claims the best method of doing it, through an Assessment Center approach, is too expensive.

The EEOC Guidelines accept evidence of content validity for tests "that consist of suitable samples of the *essential* knowledge, skills or behaviors composing the job in question." 29 C.F.R. § 1607.5(a) (1975) (emphasis added). Similarly, the APA Standards, which the EEOC Guidelines refer the reader to, clearly warn that:

> An employer cannot justify an employment test on grounds of content validity if he cannot demonstrate that the content universe includes *all, or nearly all,* important parts of the job.

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 29 (1974) (emphasis added).

It is clear that this court's objection to this test is similar to the objections of other courts. In a decision where Blacks and Hispanics challenged the *content* validity of a correction officer's exam, the court also questioned the test's lack of comprehensiveness:

> More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job.

> Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations.

Kirkland v. *New York State Dept. of Correctional Services*, 374 F.Supp. 1361, 1378 (S.D.N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420 (2d Cir. 1975). In *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Commission, supra*, 360 F.Supp. at 1274, *aff'd*, 490 F.2d 387 (2d Cir. 1973), the court quite simply stated: "[a]n examination has content validity if the content of the examination matches the content of the job.[10] Though the district court was "convinced" from the *job analysis* that the "areas tested sufficiently identify suitable candidates for promotion," it is this court's opinion that an erroneous legal standard was applied in reaching that conclusion. The job analysis here may have appeared impressive in relation to those challenged in other cases, but a good analysis in any situation is of little use when the examination fails to reflect what is found in the job analysis. The test is not *content* valid. In short, even a common sense concept of content validity, aside from EEOC and APA Standards, requires that an important and distinguishing attribute be tested in some manner to find the best qualified applicants. Here, where the exam failed to test a job component comprising over 40 percent of the employee's time, the inference of discrimination has not been rebutted with a finding of the exam's "job-relatedness."

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[10] The court continued: "It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F.Supp. at 1274. *See also Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975). "'Content' validity is established when the content of the test *closely approximates* the tasks to be performed on the job by the applicant." *Id.* at 984 (emphasis added) (footnote omitted). *See also Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1338 (2d Cir. 1973). Dr. O'Leary said at trial: "Content validity is validity demonstrated when one can show that the content of his predictors * * * are *very close* to the content of the job that the person is going to be performing." (Emphasis added).

Both experts agree that there is no good pen and paper test for evaluating supervisory skills. In his validation study Dr. O'Leary had anticipated that supervisory ability would be judged after an employee had been selected and placed on the job through the use of a "six months working test period." According to the validation study, the individual's supervisory abilities would be "closely scrutinized" and his performance evaluated on a pass/fail basis. Whatever merit this idea may have as a means of eliminating unfit employees after they are chosen, it cannot substitute for a valid selection method utilized at the outset to fairly pick the best employees in a nondiscriminatory manner. The many who are not picked for the "working test period" obviously have no opportunity to compete or to raise their rank by a demonstration of their ability. Significantly, the City's director of personnel testified that though the working test portion has "always existed" he did not know whether a fire captain had ever been eliminated because of his performance during that period. Used in this manner, the probationary period would prove even less valuable as a means of selection.

Both experts also testified at trial concerning an excellent method of supervisory evaluation known as the Assessment Center technique. Dr. O'Leary had himself used it for the deputy and fire chief examination in St. Louis, labeling it as "one of the most effective methods" available. He described the Assessment Center as a selection procedure which uses individual and group exercises that simulate job responsibilities while assessors evaluate a candidate's performance. The Assessment Center was apparently rejected for choosing fire captains because of the large number of persons who wish to take that test. The evidence indicates that the assessment technique takes at least one day and costs as much as $500 per person.

Dr. Barrett, who is enthusiastic about this approach as well, has suggested a means for reducing the expense through the use of a content valid screening test. As the court understands his

testimony, the written test would be a screening device *only*, eliminating those persons who obviously did not possess the requisite job knowledge to perform at the captain's level. The Assessment Center could then be used to *rank* those persons who successfully complete the written exam. Dr. Barrett, however, also testified that this cutoff score would need to be relatively low. As Dr. Barrett testified, another possible screening device is performance ratings given from the lower level job.

This court clearly does not have enough evidence in the record or testing expertise to devise a complete remedy for testing supervisory skills using the Assessment Center or any other method. Other courts have dealt with the problem and in similar causes of action concerning invalid exams have directed "executive or administrative officials to live up to their responsibilities and to prepare and conduct an examination consonant with the Fourteenth Amendment." *Vulcan Society of New York City Fire Dept., Inc.* v. *Civil Service Commission, supra,* 360 F.Supp. at 1278.

Other courts have also dealt with the necessity of testing *supervisory* skill where that attribute was critical. In affirming the district court's rejection of New York City's exam for school principals, the court of appeals said:

> The [district] judge did not outlaw other written examinations or indicate that none could be created to test more fairly the qualities necessary for a supervisory job. It may well be that new testing procedures will be devised by the parties themselves and be approved by the district court.

Chance v. *Board of Examiners,* 458 F.2d 1167, 1179 (2d Cir. 1972) (footnotes omitted).

This court will take the same general approach of urging the parties on remand to devise a test of supervisory skills to be approved by the district court. The one caveat is that the final test *must be validated* in accordance with the published EEOC

Guidelines. This may be accomplished by devising a content valid test or by a concurrent criterion-related validity test. The Assessment Center is a concededly good device, but the court will not at this point *require* that approach to be the sole method finally used. Whatever test is used should provide equal reliability and validity. Because of the difficulty of devising a test properly reflecting the supervisory skills of the applicants, it is possible that a criterion-related concurrent validation test coupled with a limited use of the Assessment Center would meet the guidelines. Cost to the City is one factor which may be considered in deciding whether to use the Assessment Center technique,[11] but it may not be the sole deciding factor.

The district court shall have continuing jurisdiction until a valid exam is devised by the parties to these cases, if possible, and may require reports or take evidence on testing procedures as it deems necessary. The final plan will be subject to that court's approval.

Both appellants also argue that the test has a number of "flawed items" which invalidate the written exam even for the areas of job knowledge it has attempted to cover. At trial Dr. Barrett had criticized many of the individual questions that were used on the test.[12] Though Dr. Barrett gave examples of each of

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[11] If a screening device is used in conjunction with Assessment Center, development of a fair cutoff score is obviously important. The EEOC Guidelines provide:

> It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

29 C.F.R. § 1607.6 (1975).

[12] Dr. Barrett objected to "tenuous linkage" in some questions: questions where a correct answer did not guarantee adequate performance on the job; and questions that gave a premium to the testwise individual. Other items, he said, called for "specific information" not related to job performance.

his specific criticisms, his testimony does not render the trial court clearly erroneous. When asked if each item on a test had to be valid in order for the whole test to be valid, he replied that it did not. He previously admitted not having made a study of the entire fire captain's exam to determine the *total* number of poor and unrelated questions. This Court agrees that some improvement could be made in this area.

Supper Clubs

The second principal claim concerns the exclusion of blacks from the "supper clubs." Supper clubs are informal eating arrangements among on-duty firefighters at firehouses in the St. Louis Fire Department. Cooking facilities, stove, refrigerator, and cabinets for storage, are provided by the City for the use of its on-duty personnel. Each supper club provides for its own utensils and condiments and buys food for the shared meals. A cook is chosen, who the district court found "has the discretion and authority to determine who is a member of the club." The clubs are not organized or regulated by the Fire Department.

As a finding of fact the district court concluded that blacks have been excluded from many of these clubs. These exclusions, the court found, *frequently* result in blacks, where a minority in a firehouse, cooking and eating apart from their white associates.

The district court felt that such segregation was "offensive" and "incomprehensible" but concluded that because no Fire Department directive or order promoted the exclusivity, the court would not intervene. The district court did indicate that if the problem persisted it would seek a solution.

The existence of segregated supper clubs was accepted as a fact by the district court and that fact is accepted here. This court as well finds the exclusion of black co-workers by whites highly offensive, and regards the situation as one which the Fire Department could remedy by appropriate regulations.

In *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court in determining that the Commission possessed "the statutory authority to investigate psychological fringes in an employment relationship," discussed the scope of Title VII's authority to alleviate race discrimination:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. * * *
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> * * * * * * * *
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> * * * Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimina-

> tion. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

See also Wilson v. Woodward Iron Co., 362 F.Supp. 886, 896 (N.D. Ala. 1973). The language in *Rogers* is apposite to the situation in this case.

The City provides the cooking facilities in each firehouse for use by its on-duty personnel as part of their employment; it is clear that city officials have been made aware of the segregated eating arrangements in the firehouses for some time and have protested their inability to solve the problem to the district court.

On remand of this case to the district court, that court should renew the interest it had indicated it had in an ongoing review of the supper club problem by supervising the Department's promulgation of new regulations. Those regulations should provide that use of city facilities by supper clubs may not continue in a discriminatory and segregated manner. In other words the supper clubs may not use City kitchen facilities if they refuse membership to blacks. In this way the City may comport with its duty to provide a non-discriminatory working environment; additionally, the inclusion of blacks and the reduction of racial tension in firehouses cannot help but aid the City as an employer where the job at hand requires the close cooperation of its employees and a concerted team effort.

Battalion Chief's Exam and the Matter of George Horne

The F.I.R.E.-Appellants have appealed the district court's decision that a prima facie case of racial discrimination was not shown with respect to the use of the battalion chief's examination. We affirm. It is undisputed that results from the *exam* showed no disparate racial impact. Two of the three blacks who

took the examination passed it and at least one will be appointed to the higher level supervisory position. F.I.R.E. argues, however, that a comparison of the racial composition of the employment *pool* with the lack of black battalion chiefs clearly suffices for a prima facie showing of racial discrimination. This argument is rejected. In *Carter v. Gallagher,* 452 F.2d 315, 323 (8th Cir. 1971), this court held that demographical "[s]tatistical evidence can make a prima facie case of discrimination" in a situation where an all white 535 man Fire Department operated in a large city with a 6.44 percent black population. In St. Louis, eleven percent of the *existing* force is black, and blacks will be hired at a 50 percent rate on the entry level pursuant to the district court's order.

In the case on which F.I.R.E. makes its primary claim for support, the court used census figures to *supplement* "meager exam statistics" which *had* shown a racial disparity. *See Boston Chapter N.A.A.C.P., Inc. v. Beecher,* 504 F.2d 1017, 1020 (1st Cir. 1974). This is obviously not the case here.

Likewise, the district court is affirmed in the matter of George Horne. The district court found that a *union official* had written a letter to Mr. Horne in which he told him that six vacancies would be available. The district court also found that a Deputy Chief had told Horne he would speak to the Fire Chief concerning a promotion. However, only four new fire captains were requisitioned by the Fire Department at that time, eliminating Horne from consideration prior to the expiration of the eligibility list.

F.I.R.E. points to no evidence which suggests that racial discrimination was the Department's motive in making a request for four new captains. In fact, George Horne was sixth on the eligibility list, and a white man who was fifth and would precede Horne was also passed over for promotion.

As a final matter, St. Louis has raised the issue of whether or not the district court erred in not dismissing the suit brought by

the United States under 42 U.S.C. §§ 2000e-5(f) and 2000e-6 (b). It is the City's contention that the United States could only participate in this suit as an intervenor; that to bring their own suit is duplicative and contrary to the intent of the statute. The United States argues that St. Louis is precluded from raising this issue because of failure to cross-appeal; that the suit by the United States is brought on the basis of 47 charges filed with the EEOC, 30 of which were not included in the F.I.R.E. complaint; that the United States also proceeded under the pattern and practice authority of § 200e-6 on behalf of the "public interest" and accordingly, presents policy considerations different from those presented by private litigants; and finally the consolidation of the cases provides an equivalent practical effect.

We agree with each of the reasons advanced by the United States (with the exception of the second reason), and, in view of the consolidation of the cases for trial, and the fact that F.I.R.E. raised the same questions as the United States on appeal, we do not consider our determination to be in conflict with *EEOC v. Missouri Pacific Railroad Co.*, 493 F.2d 71 (8th Cir. 1974).

A question is also raised concerning the jurisdiction of the district court to enter its nunc pro tunc order of June 28, 1976.[14] Without passing on this question we direct that at the time the district court reassumes jurisdiction of the cases on remand, it should reenter its order as of that date.

Also at that time the district court should award appropriate attorney's fees to F.I.R.E. for work prior to this appeal. The court had previously indicated it was without jurisdiction to do so after an appeal was taken. Attorney's fees under Title VII may be awarded pursuant to 42 U.S.C. § 2000e-5(k). The fees awarded in this case, both on remand and upon completion of

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[14] *See* note 1, *supra*.

the balance of the case, should be in a fair and reasonable amount in accordance with twelve guidelines set by the court in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In our opinion the award of $3,000 suggested by the trial court is grossly inadequate under these guidelines for work done prior to appeal.

Accordingly, the judgment of the district court is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views expressed in this opinion. Attorney's fees for this appeal will be awarded to F.I.R.E. upon submission of affidavits relating to the guidelines described in *Johnson v. Georgia Highway Express, Inc., supra,* 488 F.2d 714.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74 - 200 C (3)

Unites States of America,
Plaintiff,

vs.

City Of St. Louis, et al.,
Defendants.

No. 74 C 30 (3)

Firefighters Institute For Racial Equality, et al.,
Plaintiffs,

vs.

The City Of St. Louiis, Missouri, et al.,
Defendants.

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motions of the parties, the Court hereby enters the following order in these causes. Prior thereto the Court expresses deep disappointment with the intransigence of all parties and their continued unwillingness to conscientiously and industriously seek an acceptable procedure for filling the numerous vacancies existing in the position of Fire Captain, which vacancies should be filled if the safety of the persons and properties of St. Louisans is to be assured.

IT IS HEREBY ORDERED that the October 21, 1977 order of this Court be and is set aside.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court's nunc pro tunc order of June 28, 1976 is hereby re-entered as of this date and made a part of this order and that all reports and records as are provided for therein shall be accessible to counsel for all parties.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants, their officials, agents, employees and all persons acting in concert with them are hereby permanently enjoined from engaging in any act or practice with respect to promotions to the rank of Fire Captain within the St. Louis Fire Department which has the unlawful purpose or effect of discriminating against any black applicant for such position because of race or color.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants are permanently enjoined from making permanent or temporary appointments or acting assignments to the position of Fire Captain in any fashion which is in any respect based upon the eligibility list or written test for Fire Captain prepared in 1974.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, except as otherwise provided herein, defendants shall make no appointments to the position of Fire Captain except upon the basis of an examination process shown to be valid in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the guidelines of the Equal Employment Opportunity Commission issued thereunder. If defendants wish to assert the validity of an examination, they shall submit to counsel for all parties at least sixty days prior to any intended use, evidence of the validity of the elements of the process, including a copy of the validation study and all underlying documents or data concerning the development of the selection process and its validity. If the parties are unable to agree upon the validity of the process, the process shall not be utilized

unless and until the Court determines, upon motion and such evidentiary hearing as it deems appropriate, that the process has been properly validated. The examination, and copying of any examination process by the parties herein, shall be subject to such protective orders as the Court deems necessary.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that pending development of a valid examination, defendants may, if they so desire, make appointments to the position of Fire Captain by utilizing the following procedure:

a) Within two weeks of this date, defendants shall, with the assistance of the parties herein, prepare a racially-identified list of all firefighters who have served five years or more in the position of firefighter, in the order of the departmental seniority date of each firefighter. The sole purpose of such list shall be to serve as the source for promotions as set forth in this provision. The name of any firefighter eligible to be included thereon shall be removed and not considered if he so directs.

b) The black firefighter with the most departmental seniority and the white firefighter with the most departmental seniority shall then be evaluated by the Assessment Center technique. The firefighter receiving the higher ranking evaluation between the two shall be promoted, regardless of race or comparative seniority. The other firefighter who is not promoted shall then become eligible for the next Fire Captain position to be filled. Also eligible for such position shall be the black firefighter with the next longest departmental seniority and the white firefighter with the next longest departmental seniority, who shall also both be evaluated by the Assessment Center technique. The firefighter receiving the highest evaluation of the three shall be promoted.

c) The same procedure shall be followed for each vacancy to be filled: with each appointment to a vacancy, the applicant or applicants who had the lower evaluation ratings and had not been appointed to prior vacancies shall be eligible for the next appointment, along with the remaining most senior black firefighter and the remaining most senior white firefighter, who shall likewise be evaluated by the Assessment Center technique. The firefighter receiving the highest ranking evaluation shall be promoted. Again, those firefighters not so promoted shall then become eligible for the next Fire Captain position to be filled. The defendants may fill as many vacancies in the position of Fire Captain as they desire by following the foregoing procedure.

IT IS FURTHER ORDERED that, in any event, pending development of a valid examination, the parties may agree upon any procedure they choose for making permanent or temporary or acting appointments to the position of Fire Captain.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall, within thirty days of this date, submit to counsel for all parties appropriate regulations assuring that persons will not be excluded on the basis of race or color from communal eating arrangements within firehouses. Upon agreement by the parties, the Court shall order the implementation of such regulations. If the parties fail to agree, the matter shall be submitted to the Court for resolution.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall retain for a period of five years all records relating to the screening, selection and appointment of persons for the position of Fire Captain, including all applications, identified by race, and all records relating to the selection procedure. Counsel for all parties shall have the right to inspect and copy all such documents upon reasonable notice to defendants without further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that defendants shall submit, together with the reports required in the June 28, 1976 nunc pro tunc order incorporated herein,

a) the name, address, telephone number, date of appointment and race of each person appointed to the position of Fire Captain;

b) the number of persons identified by race who were disqualified for appointment to the position of Fire Captain, classified by the reason for disqualification;

c) the name, address, telephone number and race of each person who failed to complete probation as a Fire Captain;

d) a racially-identified copy of any eligibility list for Fire Captain established during that period;

e) a racially-identified list of persons serving as acting captains during the reporting period, showing hours served for each person in that acting capacity.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that this Court retain jurisdiction of this action for a period of five years for such further relief or other orders as may be necessary or appropriate. At any time after five years from date of entry of this order, defendants may move the Court upon forty-five days' notice to the parties for dissolution of this order and upon their showing that the goals of this order have been achieved, the order may be dissolved.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that plaintiffs shall be awarded costs incurred herein.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that attorney's fees in the amount of $12,250.00 shall be awarded to counsel for plaintiff Firefighters Institute for Racial Equality.

/s/ John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: January 26, 1978.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 74-200 C (3)

United States of America,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

No. 74 C 30 (3)

Firefighters Institute For Racial Equality, et al.,
Plaintiff,

vs.

City Of St. Louis, Missouri, et al.,
Defendants.

ORDER

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motion of the parties, the Court hereby enters the following order in these causes.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the City of St. Louis shall immediately promote the top or first twelve (12) black firefighters who passed the 1974 examination to the position of fire captain, if otherwise still qualified.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by this Court, in the exercise of its discretion, that the City of St. Louis shall immediately promote the top or first twelve (12) white firefighters who passed the 1974 examination to the position of fire captain, if otherwise still qualified.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that any additional promotions which the City of St. Louis desires to make prior to the development of a valid examination must be made in accordance with the Assessment Center technique, as previously set forth by this Court in its order of January 26, 1978.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the City of St. Louis, its agents, servants, and employees and all persons acting in concert with them are hereby permanently enjoined from making any assignments to the position of acting fire captain that does unfairly disadvantage black candidates for promotion and further, in order to implement this the City of St. Louis is required to make said assignments reflecting a fifty (50) per cent black ratio, as far as practicable, pending the development of a valid examination.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the City of St. Louis utilize best efforts to develop a properly validated examination for the position of fire captain by January 1, 1979. The Court shall assist in the expedition of resolving any parties' objections to said examination.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that F.I.R.E. be awarded the further sum of Four Thousand dollars ($4,000.00) for attorney's fee.

/s/ John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: December 19, 1978.

APPENDIX G

Pertinent Provisions Of Title VII Of The Civil Rights Act Of 1964, As Amended

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate ad-

viser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

* * *

Pub.L. 88—352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89—554, §8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24,1972, 86 Stat. 103.

* * *

42 U.S.C. § 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(h) Notwithstanding any other provision of this subchapter, it shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-managment committee subject to this sub-

chapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88—352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92—261, § 8(a), (b), Mar.24, 1972, 86 Stat. 109.

APPENDIX H

Uniform Guidelines on Employee Selection Procedures (1978)

43 Fed. Reg. 38290 (Aug. 25, 1978)

Title 29—Labor
CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Title 5—Administrative Personnel
CHAPTER 1—CIVIL SERVICE COMMISSION
PART 300—EMPLOYMENT (GENERAL)

Title 28—Judicial Administration
CHAPTER 1—DEPARTMENT OF JUSTICE
PART 50—STATEMENTS OF POLICY

Title 41—Public Contracts and Property Management
CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR
PART 60-3— UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Adoption of Employee Selection Procedures

AGENCIES: Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice and Department of Labor.

ACTION: Adoption of uniform guidelines on employee selection procedures as final rules by four agencies.

SUMMARY: This document sets forth the uniform guidelines on employee selection procedures adopted by the equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and the Department of Labor. At present two different sets of guidelines exist. The guidelines are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin.

Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice), 29 CFR Part 1607 (Equal Employment Opportunity Commission), and 41 CFR Part 60-3 (Department of Labor) elsewhere in this issue.

EFFECTIVE DATE: September 25, 1978.

FOR FURTHER INFORMATION CONTACT: [Omitted in printing.]

SUPPLEMENTARY INFORMATION:

An Overview of the 1978 Uniform Guidelines On Employee Selection Procedures

I. BACKGROUND

One problem that confronted the Congress which adopted the Civil Rights Act of 1964 involved the effect of written preemployment tests on equal employment opportunity. The use of these test scores frequently denied employment to minorities in many cases without evidence that the tests were related to success on the job. Yet employers wished to continue to use such tests as practical tools to assist in the selection of qualified employees. Congress sought to strike a balance which would proscribe discrimination, but otherwise permit the use of tests in the selection of employees. Thus, in title VII, Congress authorized the use of "any professionally developed ability test provided that such test, its administration or action upon the results is not designed intended or used to discriminate ***".[1]

At first, some employers contended that, under this section, they could use any test which had been developed by a professional so long as they did not intend to exclude minorities, even if such exclusion was the consequence of the use of the test. in

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[1]Section 703(h), 42 U.S.C. 2000e(2)(h).

1966, the Equal Employment Opportunity Commission (EEOC) adopted guidelines to advise employers and other users what the law and good industrial psychology practice required.[2] the Department of Labor adopted the same approach in 1968 with respect to tests used by Federal Contractors under Executive Order 11246 in a more detailed regulation. The Government's view was that the employer's intent was irrelevant. If tests or other practices had an adverse impact on protected groups, they were unlawful unless they could be justified. To justify a test which screened out a higher proportion of minorities, the employer would have to show that it fairly measured or predicted performance on the job. Otherwise, it would not be considered to be "professionally developed."

In succeeding years, the EEOC and the Department of Labor provided more extensive guidance which elaborated upon these principles and expanded the guidelines to emphasize all selection procedures. In 1971 in *Griggs* v. *Duke Power Co.*,[3] the Supreme Court announced the principle that employer practices which had an adverse impact on minorities and were not justified by business necessity constituted illegal discrimination under title VII. Congress confirmed this interpretation in the 1972 amendments to title VII. The elaboration of these principles by courts and agencies continued into the mid-1970's,[4] but differences between the EEOC and the other agencies (Justice, Labor, and Civil Service Commission) produced two different sets of guidelines by the end of 1976.

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[2]See 35 U.S.L.W. 2137 (1966).

[3]401 U.S. 424(1971).

[4]See, *e.g.*, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

With the advent of the Carter administration in 1977, efforts were intensified to produce a unified government position. The following document represents the result of that effort. This introduction is intended to assist those not familiar with these matters to understand the basic approach of the uniform guidelines. While the guidelines are complex and technical, they are based upon the principles which have been consistently upheld by the courts, the Congress, and the agencies.

The following discussion will cite the sections of the Guidelines which embody these principles.

II. ADVERSE IMPACT

The fundamental principle underlying the guidelines is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal under title VII and the Executive order unless justified by business necessity.[5] A selection procedure which has no adverse impact generally does not violate title VII or the Executive order.[6] This means that an employer may usually avoid the application of the guidelines by use of procedures which have no adverse impact.[7] If adverse impact exists, it must be justified on grounds of business necessity. Normally, this means by validation which demonstrates the relation between the selection procedure and performance on the job.

The guidelines adopt a "rule of thumb" as a practical means of determining adverse impact for use in enforcement proceedings. This rule is known as the "4/5ths" or "80 percent"

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[5] *Griggs*, note 3, supra; uniform guidelines on employee selection procedures (1978), section 3A, (hereinafter cited by section number only).

[6] *Furnco* v. *Waters*, 98 S.Ct. 2943 (1978).

[7] Section 6.

rule.[8] It is not a legal definition of discrimination, rather it is a practical device to keep the attention of enforcement agencies on serious discripancies in hire or promotion rates or other employment decisions. To determine whether a selection procedure violates the "4/5ths rule", an employer compares its hiring rates for different groups.[9] But this rule of thumb cannot be applied automatically. An employer who has conducted an extensive recruiting campaign may have a larger than normal pool of applicants, and the "4/5ths rule" might unfairly expose it to enforcement proceedings.[10] On the other hand, an employer's reputation may have discouraged or "chilled" applicants of particular groups from applying because they believed application would be futile. The application of the "4/5ths" rule in that situation would allow an employer to evade scrutiny because of its own discrimination.[11]

III. IS ADVERSE IMPACT TO BE MEASURED BY THE OVERALL PROCESS?

In recent years some employers have eliminated the overall adverse impact of a selection procedure and employed sufficient numbers of minorities or women to meet this "4/5ths rule of thumb". However, they might continue use of a component which does have an adverse impact. For example, an employer might insist on a minimum passing score on a written test which is not job related and which has an adverse impact on minorities.[12] However, the employer might compensate for this

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[8]Section 4D.

[9]Section 16R (definition of selection rate).

[10]Section 4D (special recruiting programs).

[11]*Ibid* (user's actions have discouraged applicants).

[12]See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

adverse impact by hiring a sufficient proportion of minorities who do meet its standards, so that its over hiring is on a par with or higher than the applicant flow. Employers have argued that as long as their "bottom line" shows no overall adverse impact, there is no violation at all, regardless of the operation of a particular component of the process.

Employee representatives have argued that rights under equal employment opportunity laws are individual, and the fact that an employer has hired some minorities does not justify discrimination against other minorities. Therefore, they argue that adverse impact is to be determined by examination of each component of the selection procedure, regardless of the "bottom line." This question has not been answered definitively by the courts. There are decisions pointing in both directions.

These guidelines do not address the underlying question of law. They discuss only the exercise of prosecutorial discretion by the Government agencies themselves.[13] The agencies have decided that, generally, their resources to combat discrimination should be used against those respondents whose practices have restricted or excluded the opportunities of minorities and women. If an employer is appropriately including all groups in the workforce, it is not sensible to spend Government time and effort on such a case, when there are so many employers whose practices do have adverse effects which should be challenged. For this reason, the guidelines provide that, in considering whether to take enforcement action, the Government will take into account the general posture of the employer concerning equal employment opportunity, including its affirmative action plan and results achieved under the plan.[14] There are some circumstances where the government may intervene even though the "bottom line" has been satisfied. They include the case

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[13]Section 4C.

[14]Section 4E.

where a component of a selection procedure restricts promotional opportunities of minorities or women who were discriminatorily assigned to jobs, and where a component, such as a height requirement, has been declared unlawful in other situations.[15]

What of the individual who is denied the job because of a particular component in a procedure which otherwise meets the "bottom line" standard? The individual retains the right to proceed through the appropriate agencies, and into Federal court.[16]

IV. WHERE ADVERSE IMPACT EXISTS: THE BASIC OPTIONS

Once an employer has established that there is adverse impact, what steps are required by the guidelines? As previously noted, the employer can modify or eliminate the procedure which produces the adverse impact, thus taking the selection procedure from the coverage of these guidelines. If the employer does not do that, then it must justify the use of the procedure on grounds of "business necessity."[17] This normally means that it must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure. Thus the bulk of the guidelines consist of the Government's interpretation of standards for validation.

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[15]Section 4C.

[16]The processing of individual cases is excluded from the operation of the bottom line concept by the definition of "enforcement action," section 161. Under section 4C, where adverse impact has existed, the employer must keep records of the effect of each component for 2 years after the adverse effect has dissipated.

[17]A few practices may be used without validation even if they have adverse impact. See, *e.g.*, *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and section 6B.

V. VALIDATION: CONSIDERATION OF ALTERNATIVES

The concept of validation as used in personnel psychology involves the establishment of the relationship between a test instrument or other selection procedure and performance on the job. Federal equal employment opportunity law has added a requirement to the process of validation. In conducting a validation study, the employer should consider available alternatives which will achieve its legitimate business purpose with lesser adverse impact.[18] The employer cannot concentrate solely on establishing the validity of the instrument or procedure which it has been using in the past.

This same principle of using the alternative with lesser adverse impact is applicable to the manner in which an employer uses a valid selection procedure.[19] The guidelines asume that there are at least three ways in which an employer can use scores on a selection procedure: (1) To screen out of consideration those who are not likely to be able to perform the job successfully; (2) to group applicants in accordance with the likelihood of their successful performance on the job, and (3) to rank applicants, selecting those with the highest scores for employment.[20]

The setting of a "cutoff score" to determine who will be screened out may have an adverse impact. If so, an employer is required to justify the initial cutoff score by reference to its need for a trustworthy and efficient work force.[21] Similarly, use of

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[18] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).

[19] Sections 3B; 5G.

[20] *Ibid.*

[21] See sections 3B; 5H. See also sections 14B(6) (criterion-related validity); 14C(9) (content validity); 14D(1) (construct validity).

results for grouping or for rank ordering is likely to have a greater adverse effect than use of scores solely to screen out unqualified candidates. If the employer chooses to use a rank order method, the evidence of validity must be sufficient to justify tht methods of use.[22]

VI. TESTING FOR HIGHER LEVEL JOBS

Normally, employers test for the job for which people are hired. However, there are situations where the first job is temporary or transient, and the workers who remain are promoted to work which involves more complex activities. The guidelines restrict testing for higher level jobs to users who promote a majority of the employees who remain with them to the higher level job within a reasonable period of time.[23]

VII. HOW IS VALIDATION TO BE CONDUCTED

Validation has become highly technical and complex, and yet is constantly changing as a set of concepts in industrial psychology. What follows here is a simple introduction to a highly complex field. There are three concepts which can be used to validate a selection procedure. These concepts reflect different approaches to investigating the job relatedness of selection procedures and may be interrelated in practice. They are (1) criterion-related validity,[24] (2) content validity,[25] and (3) construct validity.[26] In criterion-related validity, a selection pro-

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[22]Sections 5G, 14B(6); 14C(9); 14D(1).

[23]Sections 51.

[24]Sections 5B, (General Standards); 14B (Technical Standards); 15B (Documentation); 16F (Definition).

[25]Sections 5B (General STandards); 14C (Technical Standards); 15C (Documentation); 16D (Definition).

[26] Sections 5B (General Standards); 14D (Technical Standards); 15D (Documentation); 16E (Definition).

cedure is justified by a statistical relationship between scores on the test or other selection procedure and measures of job performance. In content validity, a selection procedure is justified by showing that it representatively samples significant parts of the job, such as a typing test for a typist. Construct validity involves identifying the psychological trait (the construct) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of "leadership ability."

The guidelines contain technical standards and documentation requirements for the application of each of the three approaches.[27] One of the problems which the guidelines attempt to meet is the "borderline" between "content validity" and "construct validity." The extreme cases are easy to understand. A secretary, for example, may have to type. Many jobs require the separation of important matters which must be handled immediately from those which can be handled routinely. For the typing function, a typing test is appropriate. It is justifiable on the basis of content validity because it is a sample of an important or critical part of the job. The second function can be viewed as involving a capability to exercse selective judgment in light of the surrounding circumstances, a mental process which is difficult to sample.

In addressing this situation, the guidelines attempt to make it practical to validate the typing test by a content strategy,[28] but do not allow the validation of a test measuring a construct such as "judgment" by a content validity strategy.

The bulk of the guidelines deals with questions such as those discussed in the above paragraphs. Not all such questions can be answered simply, nor can all problems be addressed in the single document. Once the guidelines are issued, they will have to be interpreted in light of changing factual, legal, and professional circumstances.

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[27] Technical standards are in section 14; documentation requirements are in section 15.

[28] Section 14C.

VIII. SIMPLIFICATION OF REPORTING AND RECORDKEEPING REQUIREMENTS

The reporting and recordkeeping provisions which appeared in the December 30 draft which was published for comment have been carefully reviewed in light of comments received and President Carter's direction to limit paperwork burdens on those regulated by Government to the minimum necessary for effective regulation. As a result of this review, two major changes have been made in the documentation requirements of the guidelines:

(1) A new section 15A(1) provides a simplified recordkeeping option for employers with fewer than 100 employees;

(2) Determinations of the adverse impact of selection procedures need not be made for groups which constitute less than 2 percent of the relevant labor force.

Also, the draft has been changed to make clear that users can assess adverse impact on an annual basis rather than on a continuing basis.

Analysis of comments. The uniform guidelines published today are based upon the proposition that the Federal Government should speak to the public and to those whom it regulates with one voice on this important subject; and that the Federal Government ought to impose upon itself obligations for equal employment opportunity which are at least as demanding as those it seeks to impose on others. These guidelines state a uniform Federal position on this subject, and are intended to protect the rights created by title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, as amended, and other provisions of Federal law. The uniform guidelines are also intended to represent "professionally acceptable methods" of the psychological profession for demonstrating whether a selection procedure validily predicts or measures performance for a

particular job. *Albemarle Paper Co.* v. *Moody,* 442 U.S. 405, 425. They are also intended to be consistent with the decisions of the Supreme Court and authoritative decisions of other appellate courts.

Although the development of these guidelines preceded the issuance by President Jimmy Carter of Executive Order 12044 designed to improve the regulatory process, the spirit of his Executive order was followed in their development. Initial agreement among the Federal agencies was reached early in the fall of 1977, and the months from October 1977 until today have been spent in extensive consultation with civil rights groups whose clientele are protected by these guidelines; employers, labor unions, and State and local governments whose employment practices are affected are affected by these guidelines; State and local government antidiscrimination agencies who share with the Federal Government enforcement responsibility for discriminatory practices; and appropriate members of the general public. For example, an earlier draft of these guidelines was circulated informally for comment on October 28, 1977, pursuant to OMB Circular A-85. Many comments were received from representatives of State and local governments, psychologists, private employers, and civil rights groups. Those comments were taken into account in the draft of these guidelines which was published for comment December 30, 1977, 42 FR 66542.

More than 200 organizations and individuals submitted written comments on the December 30, 1977, draft. These comments were from representatives of private industry, public employers, labor organizations, civil rights groups, the American Psychological Association and components thereof, and many individual employers, psychologists, and personnel specialists. On March 3, 1978, notice was given of a public hearing and meeting to be held on April 10, 1978, 42 FR 9131. After preliminary review of the comments, the agencies identified four issues of particular interest, and invited testimony particularly on those issues, 43 FR 11812 (March 21, 1978). In the

same notice the agencies published questions and answers on four issues of concern to the commenters. The questions and answers were designed to clarify the intent of the December 30, 1977, draft, so as to provide a sharper focus for the testimony at the hearing.

At a full day of testimony on April 10, 1978, representatives of private industry, State and local governments, labor organizations, and civil rights groups, as well as psychologists, personnel specialists, and others testified at the public hearing and meeting. The written comments, testimony, and views expressed in subsequent informal consultations have been carefully considered by the four agencies. We set forth below a summary of the comments, and the major issues raised in the comments and testimony, and attempt to explain how we have resolved those issues.

The statement submitted by the American Psychological Association (A.P.A.) stated that "these guidelines represent a major step forward and with careful interpretation can provide a sound basis for concerned professional work." Most of the A.P.A. comments were directed to clarification and interpretation of the present language of the proposal. However, the A.P.A. recommended substantive change in the construct validity section and in the definition of work behavior.

Similarly, the Division of Industrial and Organizational Psychology (division 14) of the A.P.A. described the technical standards of the guidelines as "superior" in terms of the congruence with professional standards to "most previous orders and guidelines but numerous troublesome aspects remain." Division 14 had substantial concerns with a number of the provisions of the general principles of the draft.

Civil rights generally found the uniform guidelines far superior to the FEA guidelines, and many urged the adoption, with modifications concerning ranking and documentation. Others raised concerns about the "bottom line" concept and other provisions of the guidelines.

The Ad Hoc Group on Employee Selection Procedures representing many employers in private industry supported the concept of uniform guidelines, but had a number of problems with particular provisions, some of which are described below. The American Society for Personnel Administration (ASPA) and the International Personnel Management Association, which represents State and local governments, generally took the same position as the ad hoc group. Major industrial unions found that the draft guidelines were superior to the FEA guidelines, but they perceived them to be inferior to the EEOC guidelines. They challenged particularly the bottom line concept and the construct validity section.

The building trade unions urged an exclusion of apprenticeship programs from coverage of the guidelines. The American Council on Education found them inappropriate for employment decisions concerning faculty at institutions of higher education. Other particular concerns were articulated by organizations representing the handicapped, licensing and certifying agencies, and college placement offices.

General Principles

1. *Relationship between validation and elimination of adverse impact, and affirmative action.* Federal equal employment opportunity law generally does not require evidence of validity for a selection procedure if there is not adverse impact; e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Therefore, a user has the choice of complying either by providing evidence of validity (or otherwise justifying use in accord with Federal law), or be eliminating the adverse impact. These options have always been present under Federal law, 29 CFR 1607.3; 41 CFR 60-3.3(a); and the Federal Executive Agency Guidelines, 41 FR 51734 (November 23, 1976). The December 30 draft guidelines, however, clarified the nature of the two options open to users.

Psychologists expressed concern that the December 30 draft of section 6A encouraged the use of invalid procedures as long as there is no adverse impact. Employers added the concern that the section might encourage the use of illegal procedures not having an adverse impact against the groups who have historically suffered discrimination (minorities, women), even if they have an adverse impact on a different group (whites, males).

Section 6A was not so intended, and we have revised it to clarify the fact that illegal acts purporting to be affirmative action are not the goal of the agencies or of the guidelines; and that any employee selection procedure must be lawful and should be as job related as possible. The delineation of examples of alternative procedures was eliminated to avoid the implication that particular procedures are either prescribed or are necessarily appropriate. The basic thrust of Section 6A, that elimination of adverse impact is an alternative to validation, is retained.

The inclusion of excerpts from the 1976 Equal Employment Opportunity Coordinating Council Policy Statement of Affirmative Action in section 13B of the December 30 draft was criticized as not belonging in a set of guidelines for the validation of selection procedures. Section 13 has been revised. The general statement of policy in support of voluntary affirmative action, and the reaffirmation of the policy statement have been retained, but this statement itself is now found in the appendix to the guidelines.

2. *The "bottom line" (section 4C).* The guidelines provide that when the overall selection process does not have an adverse impact the Government will usually not examine the individual components of that process for adverse impact or evidence of validity. The concept is based upon the view that the Federal Government should not generally concern itself with individual components of a selection process, if the overall effect of that process is nonexclusionary. Many commenters criticized the ambiguity caused by the word "generally" in the December 30

draft of section 4C which provided, "the Federal enforcement agencies * * * generally will not take enforcement action based upon adverse impact of any component" of a process that does not have an overall adverse impact. Employer groups stated the position that the "bottom line" should be a rule prohibiting enforcement action by Federal agencies with respect to all or any part of a selection process where the bottom line does not show adverse impact. Civil rights and some labor union representatives expressed the opposing concerns that the concept may be too restrictive, of law, and that it might allow certain discriminatory conditions to go unremedied.

The guidelines have been revised to clarify the intent that the bottom line concept is based upon administrative and prosecutorial discretion. The Federal agencies cannot accept the recommendation that they never inquire into or take enforcement action with respect to any component procedure unless the whole process of which it is a part has an adverse impact. The Federal enforcement agencies believe that enforcement action may be warranted in unusual circumstances, such as those involving other discriminatory practices, or particular selection procedures which have no validity and have a clear adverse impact on a national basis. Other unusual circumstances may warrant a high level agency decision to proceed with enforcement actions although the "bottom line" has been satisfied. At the same time the agencies adhere to the bottom line concept of allocating resources primarily to those users whose overall selection processes have an advese impact. See overview, above, part III.

3. *Investigation of alternative selection procedures and alternative methods of use (section 3B).* The December draft included an obligation on the user, when conduction a validity study, to investigate alternative procedures and uses, in order to determine whether there are other procedures which are substantially equally valid, but which have less adverse impact. The American Psychological Association stated:

> "We would concur with the drafters of the guidelines that it is appropriate in the determination of a selection strategy to consider carefully a variety of possible procedures and to think carefully about the question of adverse impact with respect to each of those procedures. Nevertheless, we feel it appropriate to note that a rigid enforcement of these sections, particularly for small employers, would impose a substantial and expensive burden on those employers."

Since a reasonable consideration of alternatives is consistent with the underlying principle of minimizing adverse impact consistent with business needs, the provision is retained.

Private employer representatives challenged earlier drafts of these guidelines as being inconsistent with the decision of the Supreme Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405. No such inconsistency was intended. Accordingly, the first sentence of section 3B was revised to paraphrase the opinion in the *Albemarle* decision, so as to make it clear that section 3B is in accord with the principles of the *Albemarle* decision.

Section 3B was further revised to clarify the intent of the guidelines that the obligation to investigate alternative procedures is a part of conducting a validity study, so that alternative procedures should be evaluated in light of validity studies meeting professional standards, and that section 3B does not impose an obligation to search for alternatives if the user is not required to conduct a validity study.

Just as, under section 3B of the guidelines, a user should investigate alternative selection procedures as a part of choosing and validating a procedure, so should the user investigate alternative uses of the selection device chosen to find the use most appropriate to his needs. The validity study should address the question of what method of use (screening, grouping, or rank ordering) is appropriate for a procedure based on the kind and strength of the validity evidence shown, and the degree of adverse impact of the different uses.

4. *Establishment of cutoff scores and rank ordering.* Some commenters from civil rights groups believed that the December 30 draft guidelines did not provide sufficient guidelines as to when it was permissible to use a selection procedure on a ranking basis rather than on a pass-fail basis. They also objected to section 5G in terms of setting cutoff scores. Other comments noted a lack of clarity as to how the determination of a cutoff score or the use of a procedure for ranking candidates relates to adverse impact.

As we have noted, users are not required to validate procedures which do not have an adverse impact. However, if one way of using a procedure (e.g., for ranking) results in greater adverse impact than another way (e.g., pass/fail), the procedure must be validated for that use. Similarly, cutoff scores which result in adverse impact should be justified. If the use of a validated procedure for ranking results in greater adverse impact than its use as a screening device, the evidence of validity and utility must be sufficient to warrant use of the procedures as a ranking device.

A new section 5G has been added to clarify these concepts. Section 5H (formerly section 5G) addresses the choice of a cutoff score when a procedure is to be used for ranking.

5. *Scope: Requests for exemptions for certain classes of users.* Some employer groups and labor organizations (e.g., academic institutions, large public employers, apprenticeship councils) argued that they should be exempted from all or some the provisions of these guidelines because of their special needs. The intent of Congress as expressed in Federal equal employment opportunity law is to apply the same standards to all users, public and private.

These guidelines apply the same principles and standards to all employers. On the other hand, the nature of the procedures which will actually meet those principles and standards may be different for different employers, and the guidelines recognize

that fact. Accordingly, the guidelines are applicable to all employers and other users who are covered by Federal equal employment opportunity law.

Organizations of handicapped persons objected to excluding from the scope of these guidelines the enforcement of laws prohibiting discrimination on the basis of handicap, in particular the Rehabilitation Act of 1973, sections 501, 503, and 504. While this issue has not been addressed in the guidelines, nothing precludes the adoption of the principles set forth in these guidelines for other appropriate situations.

Licensing and certification boards raised the question of the applicability of the guidelines to their licensing and certification functions. The guidelines make it clear that licensing and certification are covered "to the extent" that licensing and certification may be covered by Federal equal employment opportunity law.

Voluntary certification boards, where certification is not required by law, are not users as defined in section 16 with respect to their certifying functions and therefore are not subject to these guidelines. If an employer relies upon such certification in making employment decisions, the employer is the user and must be prepared to justify, under Federal law, that reliance as it would any other selection procedure.

6. *The "Four-Fifths Rule of Thumb" (section 4D).* Some representatives of employers and some professional suggest that the basic test for adverse impact should be a test of statistical significance, rather than the four-fifths rule. Some civil rights groups, on the other hand, still regard the four-fifths rule as permitting some unlawful discrimination.

The Federal agencies believe that neither of these positions is correct. The great majority of employers do not hire, promote, or assign enough employees for most jobs to warrant primary reliance upon statisical significance. Many decisions in day-to-

day life are made on the basis of information which does not have the justification of a test of statistical significance. Courts have found adverse impact without a showing of statistical significance. *Griggs* v. *Duke Power Co.*, supra; *Vulcan Society of New York* v. *CSC of N.Y.*, 490 F.2d 387, 393 (2d Cir. 1973); *Kirkland* v. *New York St. Dept. of Corr. Serv.*, 520 F.2d 420, 425 (2d Cir. 1975).

Accordingly, the undersigned believe that while the four-fifths rules does not define discrimination and does not apply in all cases, it is appropriate as a rule of thumb in identifying adverse impact.

Technical Standards

7. *Criterion-related validity (section 14B).* This section of the guidelines found general support among the commenters from the psychological profession and, except for the provisions concerning test fairness (sometimes mistakenly equated with differential prediction or differential validity), generated relatively little comment.

The provisions of the guidelines concerning criterion-related validity studies call for studies of fairness of selections procedures where technically feasible.

Some 14B(8). Some psychologists and employer groups objected that the concept of test fairness or unfairness has been discredited by professionals and pointed out that the term is commonly misused. We recognize that there is serious debate on the question of test fairness; however, it is accepted professionally that fairness should be examined where feasible. The A.P.A. standards for educational and psychological tests, for example, direct users to explore the question of fairness on finding a difference in group performances (section E9, pp. 43-44). Similarly the concept of test fairness is one which is closely related to the basic thrust of Federal equal employment oppor-

tunity law; and that concept was endorsed by the Supreme Court in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405.

Accordingly, we have retained in the guidelines the obligation upon users to investigate test fairness where it is technically feasible to do so.

8. *Content validity.* The Division of Industrial and Organizational Psychology of A.P.A. correctly perceived that the provisions of the draft guidelines concerning content validity, with their emphasis on observable work behaviors or work products, were "greatly concerned with minimizing the inferential leap between test and performance." That division expressed the view that the draft guidelines neglected situations where a knowledge, kill or ability is necessary to an outcome but where the work behavior cannot be replicated in a test. They recommended that the section be revised.

We believe that the emphasis on observable work behaviors or observable work products is appropriate; and that in order to show content validity, the gap between the test and performance on the job should be a small one. We recognize, however, that content validity may be appropriate to support a test which measures a knowledge, skill, or ability which is a necessary prerequisite to the performance of the job, even though the test might not be close enough to the work behavior to be considered a work sample, and the guidelines have been revised appropriately. On the other hand, tests of mental processes which are not directly observable and which may be difficult to determine on the basis of observable work behaviors or work products should not be supported by content validity.

Thus, the Principles for the Validation and Use of Personnel Selection Procedures (Division of Industrial and Organizational Psychology, American Psychological Association, 1975, p. 10), discuss the use of content validity to support tests of "specific items of knowledge, or specific job skills," but call attention to

the inappropriateness of attempting to justify tests for traits or constructs on a content validity basis.

9. *Construct validity (section 14D).* Business groups and professionals expressed concern that the construct validity requirements in the December 30 draft were confusing and technically inaccurate. As section 14D indicates, construct validity is a relatively new procedure in the field of personnel selection and there is not yet substantial guidance in the professional literature as to its use in the area of employment practices. The provisions on construct validity have been revised to meet the concerns expressed by the A.P.A. The construct validity section as revised clarifies what is required by the Federal enforcement agencies at this stage in the development of construct validity. The guidelines leave open the possibility that different evidence of construct validity may be accepted in the future, as new methodologies develop and become incorporated in professional standards and other professional literature.

10. *Documentation (section 15).* Commenters stated that the documentation section did not conform to the technical requirements of the guidelines or was otherwise inadequate. Section 15 has been clarified and two significant changes have been made to minimize the recordkeeping burden (See overview, part VIII).

11. *Definitions (section 16).* The definition of work behavior in the December 30, 1977 draft was criticized by the A.P.A. and others as being too vague to provide adequate guidance to those using the guidelines who must identify work behavior as a part of any validation technique. Other comments criticized the absence or inadequacies of other definitions, especially "adverse impact." Substantial revisions of and additions to this section were therefore made.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Note.—These guidelines are issued jointly by four agencies. Separate official adoptions follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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GENERAL PRINCIPLES

SECTION 1. *Statement of purpose*—A. *Need for uniformity—Issuing agencies.* The Federal Government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

Sec. 2. *Scope*—A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor,

and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which wre previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority

system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

Sec. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination.*—A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

Sec. 4. *Information on impact.*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the folowing races and tehnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), Whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components:

(1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where

the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

Sec. 5. *General standards for validity studies.*—A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct ability.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or

significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher

level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B

above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

Sec. 6. *Use of selection procedures which have not been validated.*—A. *Use of alternative selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either

modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

Sec. 7. *Use of other validity studies.*—A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* [Omitted in printing]

Sec. 8. *Cooperative studies.*—A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

Sec. 9. *No assumption of validity.*—A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its

author or its publisher, or casual reports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data hearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

Sec. 10. *Employment agencies and employment services.*—A. *Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation hereinbecause the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to

make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

Sec. 11. *Disparate treatment.* The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by busines necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

Sec. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

Sec. 13. *Affirmative action.*—A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

Technical Standards

Sec. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally accep-

table techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies.*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study. [Remainder of Sec. 14(B) omitted in printing.]

C. *Technical standards for content validity studies.*—1. *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity stragety to the ex-

tent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, common sense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) consituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge; skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behvior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples of work behaviors, the stronger is the basis for showing content validity. As the content of the selection-procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for othr evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration if the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training the the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported

solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies.*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lock of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below. [Remainder of Sec. 14[D] omitted in printing].

Documentation of Impact and Validity Evidence

Sec. 15. *Documentation of impact and validity evidence.*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO-1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, is is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a pro-

cedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence.*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not availabale the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's

control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in section 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information: [Omitted in printing].

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the Job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or

ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary of that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are

related to the speed with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information: [Omitted in printing].

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies.*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the

higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

Definitions

Sec. 16. *Definitions.* The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. *Labor organization.* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable.* Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group.* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedures.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility.* The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever a employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor

regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

Appendix

17. *Policy statement on affirmative action* (see section 13B). [Omitted in printing].

APPENDIX I

Rules and Regulations

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Title 5—Administrative Personnel

OFFICE OF PERSONNEL MANAGEMENT

PART 300-EMPLOYMENT (GENERAL)

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

PART 50—STATEMENTS OF POLICY

Title 31—Money and Finance: Treasury

CHAPTER I—MONETARY OFFICES: DEPARTMENT OF THE TREASURY

PART 51—FISCAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

Title 41—Public Contracts and Property Management

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

PART 60—3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Adoption of Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures.

AGENCIES: Equal Employment Opportunity Commission, Office of Personnel Management, Department of Labor and Department of Treasury.

ACTION: Adoption of questions and answers designed to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures.

SUMMARY: The Uniform Guidelines on Employee Selection Procedures were issued by the five Federal agencies having primary responsibility for the enforcement of Federal equal employment opportunity laws, to establish a uniform Federal government position. See 43 FR 38290, et seq. (Aug. 25, 1978) and 43 FR 40223 (Sept. 11, 1978). They became effective on September 25, 1978. The issuing agencies recognize the need for a common interpretation of the Uniform Guidelines, as well as the desirability of providing additional guidance to employers and other uses, psychologists, and investigators, compliance officers and other Federal enforcement personnel. These Questions and Answers are intended to address that need and to provide such guidance.

EFFECTIVE DATE: March 2, 1979.

FOR FURTHER INFORMATION CONTACT: [Omitted in printing.]

Introduction

The problems addressed by the Uniform Guidelines on Employee Selection Procedures (43 FR 38290 et seq., August 25, 1978) are numerous and important, and some of them are complex. The history of the development of those Guidelines is set forth in the introduction to them (43 FR 38290-95). The experience of the agencies has been that a series of answers to commonly asked questions is helpful in providing guidance not only to employers and other users, but also to psychologists and others who are called upon to conduct validity studies, and to

investigators, complaince officers and other Federal personnel who have enforcement responsibilities.

The Federal agencies which issued the Uniform Guidelines—the Departments of Justice and Labor, the Equal Employment Opportunity Commission, the Civil Service Commission (which has been succeeded in relevant part by the Office of Personnel management), and the Office of Revenue Sharing, Treasury Department—recognize that the goal of a uniform position on these issues can best be achieved through a common interpretation of the same guidelines. The following Questions and Answers are part of such a common interpretation. The material included is intended to interpret and clarify, but not to modify, the provisions of the Uniform Guidelines. The questions selected are commonly asked questions in the field and those suggested by the Uniform Guidelines themselves and by the extensive comments received on the various sets of proposed guidelines prior to their adoption. Terms are used in the questions and ansewrs as they are defined in the Uniform Guidelines.

The agencies recognized that additional questions may be appropriate for similar treatment at a later date, and contemplate working together to provide additional guidance in interpreting the Uniform Guidelines. Users and other interested persons are invited to submit additional questions.

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I. *Purpose and Scope*

1. Q. What is the purpose of the Guidelines?

A. The guidelines are designed to aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex religion or national origin. The Federal agencies have adopted the Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsbilities.

2. Q. What is the basic principle of the Guidelines?

A. A selection process which has an adverse impact on the employment opportunities of members of a race, color, religion, sex, or national origin group (referred to a "race, sex, and ethnic group," as defined in Section 16P) and thus disproportionately screens them out is unlawfully discriminatory unless the process or its component procedures have been validated in accord with the Guidelines, or the user otherwise justifies them in accord with Federal law. See Sections 3 and 6.[1] This principle was adopted by the Supreme Court

[1]Section references throughout these questions and answers are to the sections of the *Uniform Guidelines on Employee Selection Procedures* (herein referred to as "Guidelines") that were published by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice on Aug. 25, 1978, 43 FR 38290. The Uniform Guidelines were adopted by the Office of Revenue Sharing of the Department of Treasury on September 11, 1978. 43 FR 40223.

unanimously in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, and was ratified and endorsed by the Congress when it passed the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964.

3. Q. Who is covered by the Guidelines?

A. The Guidelines apply to private and public employers, labor organizations, employment agencies, apprenticeship committees, licensing and certification boards (see Question 7), and contractors or subcontrctors, who are covered by one or more of the following provisions of Federal equal employment opportunity law: Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter Title VII); Executive Order 11246, as amended by Executive Order 11246, as amended by Executive Orders 11375 and 12086 (hereinafter Executive Order 11246); the State and Local Fiscal Assistance Act of 1972, as amended; Omnibus Crime Control and Safe Streets Act of 1968, as amended; and the Intergovernmental Personnel Act of 1970, as amended. Thus, under Title VII, the Guidelines apply to the Federal Government with regard to Federal employment. Through Title VII they apply to most private employers who have 15 or more employees for 20 weeks or more a calendar year, and to most employment agencies, labor organizations and apprenticeship committees. They apply to state and local governments which employ 15 or more employees, or which receive revenue sharing funds, or which receive funds from the Law Enforcement Assistance Administration to impose and strengthen law enforcement and criminal justice, or which receive grants or other federal assistance under a program which requires maintenance of personnel standards on a merit basis. They apply through Executive Order 11246 to contractors and subcontractors of the Federal Government and to contractors and subcontractors under federally-assisted construction contracts.

4. Q. Are college placement officers and similar organizations considered to be users subject to the Guidelines?

A. Placement offices may or may not be subject to the Guidelines depending on what services they offer. If a placement office uses a selection procedure as a basis for any employment decision, it is covered under the definition of "user". Section 16. For example, if a placement office selects some students for referral to an employer but rejects others, it is covered. However, if the placement office refers all interested students to an employer, it is not covered, even though it may offer office space and provision for informing the students of job openings. The Guidelines are intended to cover all users of employee selection procedures, including employment agencies, who are subject to Federal equal employment opportunity law.

5. Q. Do the Guidelines apply only to written tests?

A. No. They apply to all selection procedures used to make employment decisions, including interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance. Sections 2B and 16Q, and see Question 6.

6. Q. What practices are covered by the Guidelines?

A. The Guidelines apply to employee selection procedures which are used in making employment decisions, such as hiring, retention, promotion, transfer, demotion, dismissal or referral. Section 2B. Employee selection procedures include job requirements (physical, education, experience), and evaluation of applicants or candidates on the basis of application forms, interviews, performance tests, paper and pencil tests, performance in training programs or probationary periods, and any other procedures used to make an employment decision whether administered by the employer or by an employment agency. See Section 2B.

7. Q. Do the Guidelines apply to the licensing and certification functions of state and local governments?

A. The Guidelines apply to such functions to the extent that they are covered by Federal law. Section 2B. The courts are divided on the issue of such coverage. The Government has taken the position that at least some kinds of licensing and certification which deny persons access to employment opportunity may be enjoined in an action brought pursuant to Section 707 of the Civil Rights Act of 1964, as amended.

8. Q. What is the relationship between Federal equal employment opportunity law, embodied in these Guidelines, and State and Local government merit system laws or regulations requiring rank ordering of candidates and selection from a limited number of the top candidates?

A. The Guidelines permit ranking where the evidence of validity is sufficient to support that method of use. State or local laws which compel rank ordering generally do so on the assumption that the selection procedure is valid. Thus, if there is adverse impact and the validity evidence does not adequately support that method of use, proper interpretation of such a state law would require validation prior to ranking. Accordingly, there is no necessary or inherent conflict between Federal law and State or local laws of the kind described.

Under the Supremacy Clause of the constitution (Art. VI, Cl. 2), however, Federal law or valid regulation overrides any contrary provision of state or local law. Thus, if there is any conflict, Federal equal opportunity law prevails. For example, in *Rosenfeld* v. *So. Pacific Co.*, 444 F. 2d 1219 (9th Cir., 1971), the court held invalid state protective laws which prohibited the employment of women in jobs entailing long hours or heavy labor, because the state laws were in conflict with Title VII. Where a State or local official believes that there is a possible conflict, the official may wish to consult with the State Attorney

General, County or City attorney, or other legal official to determine how to comply with the law.

II. *Adverse Impact, the Bottom Line and Affirmative Action*

9. Q. Do the Guidelines require that only validation selection procedures be used?

A. No. Although validationof selection procedures is desirable in personnel managment, the Uniform Guidelines require users to produce evidence of validity only when the selection procedure adversely affects the opportunities of a race, sex, or ethnic group for hire, transfer, promotion, retention or other employment decision. If there is no adverse impact, there is no validation requirement under the Guidelines. Sections 1B and 3A. See also, Section 6A.

10. Q. What is adverse impact?

A. Under the Guidelines adverse impact is a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group. Sections 4D and 16B. See Questions 11 and 12.

11. Q. What is a substantially different rate of selection?

A. The agencies have adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection. See Section 4D. This "4/5ths" or "80%" rule of thumb is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions.

For example, if the hiring rate for whites other than Hispanics is 60%, for American Indians 45%, for Hispanics 48%, and for Blacks 51%, and each of these groups constitutes more than 2% of the labor force in the relevant labor area (see Question 16), a comparison should be made of the selection rate for each group with that of the highest group (whites). These comparisons show the following impact ratios: American Indians 45/60 or 75%; Hispanics 48/60 or 80%; and Blacks 51/60 or 85%. Applying the 4/5ths or 80% rule of thumb, on the basis of the above information alone, adverse impact is indicated for American Indians but not for Hispanics or Blacks.

12. Q. How is adverse impact determined?

A. Adverse impact is determined by a four step process.

(1) calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).

(2) observe which group has the highest selection rate.

(3) calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).

(4) observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances. See Section 4D.

For example: [Table and example omitted.]

13. Q. Is adverse impact determined on the basis of the overall selection process or for the components in that process?

A. Adverse impact is determined first for the overall selection process for each job. If the overall selection process has an adverse impact, the adverse impact of the individual selection

procedure should be analyzed. For any selection procedures in the process having an adverse impact which the user continues to use in the same manner, the user is expected to have evidence of validity satisfying the Guidelines. Sections 4C and 5D. If there is no adverse impact for the overall selection process, in most circumstances there is no obligation under the Guidelines to investigate adverse impact for the components, or to validate the selection procedures used for that job. Section 4C. But see Question 25.

14. Q. The Guidelines designate the "total selection process" as the initial basis for determining the impact of selection procedures. What is meant by the "total selection process"?

A. The "total selection process" refers to the combined effect of all selection procedures leading to the final employment decision such as hiring or promoting. For example. appraisal of candidates for administrative assistant positions in an organization might include initial screening based upon an application blank and interview, a written test, a medical examination, a background check, and a supervisor's interview. These in combination are the total selection process. Additionally, where there is more than one route to the particular kind of employment decision the total selection process encompasses the combined results of all routes. For example, an employer may select some applicants for a particular kind of job through appropriate written and performance tests. Others may be selected through an internal upward mobility program, on the basis of successful performance in a directly related trainee type of position. In such a case, the impact of the total selection process would be the combined effect of both avenues of entry.

15. Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?

A. The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The con-

cept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.

The term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines.

A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process. [Question & Answer Nos. 16-19 omitted in printing.]

20. Q. Why is the 4/5ths rule called a rule of thumb?

A. Because it is not intended to be controlling in all circumstances. If, for the sake of illustration, we assume that nationwide statistics show that use of an arrest record would disqualify 10% of all Hispanic persons but only 4% of all whites other than Hispanic (hereafter non-Hispanic), the selection rate for that selection procedure is 90% for Hispanics and 96% for non-Hispanics. Therefore, the 4/5 rule of thumb would not indicate the presence of adverse impact (90% is approximately 94% of 96%). But in this example, the information is based upon nationwide statistics, and the sample is large enough to yield statistically significant results, and the difference (Hispanics are 2½ times as likely to be disqualified as non-Hispanics) is large enough to be practically significant. Thus, in

this example the enforcement agencies would consider a disqualification based on an arrest record alone as having an adverse impact. Likewise, in *Gregory* v. *Litton Industries,* 472 F. 2d 631 (9th Cir., 1972), the court held that the employer violated Title VII by disqualifying persons from employment solely on the basis of an arrest record, where that disqualification had an adverse impact on blacks and was not shown to be justified by business necessity.

On the other hand, a difference of more than 20% in rates of selection may not provide a basis for finding adverse impact if the number of persons selected is very small. For example, if the employer selected three males and one female from an applicant pool of 20 males and 10 females, the 4/5ths rule would indicate adverse impact (selection rate for women is 10%; for men 15%; 10/15 or 66 2/3% is less than 80%), yet the number of selections is too small to warrant a determination of adverse impact. In these circumstances, the enforcement agency would not require valdity evidence in the absence of additional information (such as selection rates for a longer period of time) indicating adverse impact. For recordkeeping requirements, see Section 15A(2)(c) and Questions 84 and 85. [Question & Answer Nos. 21-23 omitted in printing.]

24. Q. Why do the Guidelines rely primarily upon the 4/5ths rule of thumb, rather than tests of statistical significance?

A. Where the sample of persons selected is not large, even a large real difference between groups is likely not to be confirmed by a test of statistical significance (at the usual .05 level of significance). For this reason, the Guidelines do not rely primarily upon a test of statistical significance, but use the 4/5ths rule of thumb as a practical and easy-to-administer measure of whether differences in selection rates are substantial. Many decisions in day-to-day life are made without reliance upon a test of statistical significance. [Questions & Answer Nos. 25-29 omitted in printing.]

30. Q. When may a user be race, sex or ethnic-conscious?

A. The Guidelines recognize that affirmative action programs may be race, sex or ethnic conscious in appropriate circumstances, (See Sections 4E and 13; See also Section 17, Appendix). In addition to obligatory affirmative action programs (See Question 29), the Guidelines encourage the adoption of voluntary affirmative action programs. Users choosing to engage in voluntary affirmative action are referred to EEOC's Guidelines on Affirmative Action (44 FR 4422, January 19, 1979). A user may justifiably be race, sex or ethnic-conscious in circumstances where it has reason to believe that qualified persons of specified race, sex or ethnicity have been or may be subject to the exclusionary effects of its selection procedures or other employment practices in its work force or particular jobs therein. In establishing long and short range goals, the employer may use the race, sex, or ethnic classification as the basis for such goals (Section 17(3)(a)).

In establishing a recruiting program, the employer may direct its recruiting activities to locations or institutions which have a high proportion of the race, sex, or ethnic group which has been excluded or underutilized (section 17(3)(b)). In establishing the pool of qualified persons from which final selections are to be made, the employer may take reasonable steps to assure that members of the excluded or underutilized race, sex, or ethnic group are included in the pool (Section 17(3)(e)).

Similarly, the employer may be race, sex or ethnic-conscious in determining what changes should be implemented if the objectives of the programs are not being met (Section 17(3)(g)).

Even apart from affirmative action programs a user may be race, sex or ethnic-conscious in taking appropriate and lawful measures to eliminate adverse impact from selection procedures (Section 6A).

31. Q. Section 6A authorizes the use of alternative selection procedures to eliminate adverse impact, but does not appear to address the issue of validity. Thus, the use of alternative selection procedures without adverse impact seems to be presented as an option in lieu of validation. Is that its intent?

A. Yes. Under Federal equal employment opportunity law the use of any selection procedure which has an adverse impact on any race, sex or ethnic group is discriminatory unless the procedure has been properly validated, or the use of the procedure is otherwise justified under Federal law. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); Section 3A. If a selection procedure has an adverse impact, therefore, Federal equal employment opportunity law authorizes the user to choose lawful alternative procedures which eliminate the adverse impact rather than demonstrating the validity of the original selection procedure.

Many users, while wishing to validate all of their selection-procedures, are not able to conduct the validity studies immediately. Such users have the option of choosing alternative techniques which eliminate adverse impact, with a view to providing a basis for determining subsequently which selection procedures are valid and have as little adverse impact as possible.

Apart from Federal equal employment opportunity law, employers have economic incentives to use properly validated selection procedures. Nothing in Section 6A should be interpreted as discouraging the use of properly validated selection procedures; but Federal equal employment opportunity law does not require validity studies to be conducted unless there is adverse impact. See Section 2C.

III. *General Questions Concerning Validity and the Use of Selection Procedures*

32. Q. What is "validation" according to the Uniform Guidelines?

A. Validation is the demonstration of the job relatedness of a selection procedure. The Uniform Guidelines recognize the same three validity strategies recognized by the American Psychological Association:

(1) Criterion-related validity—a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers.

(2) Content validity—a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.

(3) Construct validity—a demonstration that (a) a selection-procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and (b) the construct is important for successful job performance.

33. Q. What is the typical process by which validity studies are reviewed by an enforcement agency?

A. The validity study is normally requested by an enforcement officer during the course of a review. The officer will first determine whether the user's data show that the overall selection process has an adverse impact, and if so, which component selection procedures have an adverse impact. See Section 15A(3). The officer will then ask for the evidence of validity for each procedure which has an adverse impact. See Sections 15B, C, and D. This validity evidence will be referred to appropriate personnel for review. Agency findings will then be communicated to the user.

34. Q. Can a user send its validity evidence to an enforcement agency before a review, so as to assure its validity?

A. No. Enforcement agencies will not review validity reports except in the context of investigations or reviews. Even in those circumstances, validity evidence will not be reviewed without

evidence of how the selection procedure is used and what impact its use has on various race, sex, and ethnic groups.

35. Q. May reports of validity prepared by publishers of commercial tests and printed in test manuals or other literature be helpful in meeting the Guidelines?

A. They may be. However, it is the user's responsibility to determine that the validity evidence is adequate to meet the Guidelines. See Section 7, and Questions 43 and 66. Users should not use selection procedures which are likely to have an adverse impact without reviewing the evidence of validity to make sure that the standards of the Guidelines are met.

The following questions and answers (36-81) assume that a selection procedure has an adverse impact and is part of a selection process that has an adverse impact.

36. Q. How can users justify continued use of a procedure on a basis other than validity?

A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business necessity" for its continued use; therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.

37. Q. Is the demonstration of a rational relationship (as that term is used in constitutional law) between a selection procedure and the job sufficient to meet the validation requirements of the Guidelines?

A. No. The Supreme Court in *Washington* v. *Davis,* 426 U.S. 229 (1976) stated that different standards would be applied to employment discrimination allegations arising under the Constitution than would be applied to employment discrimination allegations arising under Title VII. The *Davis* case arose under the Constitution, and no Title VII violation was alleged. The Court applied a traditional constitutional law standard of "rational relationship" and said that it would defer to the "seemingly reasonable acts of administrators and executives." However, it went on to point out that under Title VII, the appropriate standard would still be an affirmative demonstration of the relationship between the selection procedure and measures of job performance by means of accepted procedures of validation and it would be an "insufficient response to demonstrate some rational basis" for a selection procedure having an adverse impact. Thus, the mere demonstration of a rational relationship between a selection procedure and the job does not meet the requirement of Title VII of the Civil Rights Act of 1964, or of Executive Order 11246, or the State and Local Fiscal Assistance Act of 1972, as amended (the revenue sharing act) or the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and will not meet the requirements of these Guidelines for a validity study. The three validity strategies called for by these Guidelines all require evidence that the selection procedure is related to successful performance on the job. That evidence may be obtained through local validation or through validity studies done elsewhere.

38. Q. Can a user rely upon written or oral assertions of validity instead of evidence of validity?

A. No. If a user's selection procedures have an adverse impact, the user is expected to produce evidence of the validity of the procedures as they are used. Thus, the unsupported assertion by anyone, including representatives of the Federal government or State Employment Services, that a test battery or other selection procedure has been validated is not sufficient to satisfy the Guidelines.

39. Q. Are there any formal requirements imposed by these Guidelines as to who is allowed to perform a validity study?

A. No. A validity study is judged on its own merits, and may be performed by any person competent to apply the principles of validity research, including a member of the user's staff or a consultant. However, it is the user's responsibility to see that the study meets validity provisions of the Guidelines, which are based upon professionally accepted standards. See Question 42.

40. Q. What is the relationship between the validation provisions of the Guidelines and other statements of psychological principles, such as the *Standards for Educational and Psychological Tests,* published by the American Psychological Association (Wash., D.C., 1974) (hereinafter "American Psychological Association *Standards*")?

A. The validation provisions of the Guidelines are designed to be consistent with the generally accepted standards of the psychological profession. These Guidelines also interpret Federal equal employment opportunity law, and embody some policy determinations of an administrative nature. To the extent that there may be differences between particular provisons of the Guidelines and expressions of validation principles found elsewhere, the Guidelines will be given precedence by the enforcement agencies.

41. Q. When should a validity study be carried out?

A. When a selection procedure has adverse impact on any race, sex or ethnic group, the Guidelines generally call for a validity study or the elimination of adverse impact. See Sections 3A and 6, and Questions 9, 31, and 36. If a selection procedure has adverse impact, its use in making employment decisions without adequate evidence of validity would be inconsistent with the Guidelines. Users who choose to continue the use of a selection procedure with an adverse impact until the procedure is challenged increase the risk that they will be found to be

engaged in discriminatory practices and will be liable for back pay awards, plaintiffs' attorneys' fees, loss of Federal contracts, subcontracts or grants, and the like. Validation studies begun on the eve of litigation have seldom been found to be adequate. Users who choose to validate selection procedures should consider the potential benefit from having a validation study completed or well underway before the procedures are administered for use in employment decisions.

42. Q. Where can a user obtain professional advice concerning validation of selection procedures? [Answer omitted in printing].

43. Q. Can a selection procedure be a valid predictor of performance on a job in a certain location and be invalid for predicting success on a different job or the same job in a different location?

A. Yes. Because of differences in work behaviors, criterion measures, study samples or other factors, a selection procedure found to have validity in one situation does not necessarily have validity in different circumstances. Conversely, a selection procedure not found to have validity in one situation may have validity in different circumstances. For these reasons, the Guidelines requires that certain standards be satisfied before a user may rely upon findings of validity in another situation. Section 7 and Section 14D. See also, Question 66. Cooperative and multi-unit studies are however encouraged, and, when those standards of the Guidelines are satisfied, validity evidence specific to each location is not required. See Section 7C and Section 8.

44. Q. Is the user of a selection procedure required to develop the procedure?

A. No. A selection procedure developed elsewhere may be used. However, the user has the obligation to show that its use for the particular job is consistent with the Guidelines. See Section 7.

45. Q. Do the Guidelines permit users to engage in cooperative efforts to meet the Guidelines?

A. Yes. The Guidelines not only permit but encourage such efforts. Where users have participated in a cooperative study which meets the validation standards of these Guidelines and proper account has been taken of variables which might affect the applicability of the study to specific users, validity evidence specific to each user will not be required. Section 8.

46. Q. Must the same method for validation be used for all parts of selection process?

A. No. For example, where a selection process includes both a physical performance test and an interview, the physical test might be supported on the basis of content validity, and the interview on the basis of a criterion-related study.

47. Q. Is a showing of validity sufficient to assure the lawfulness of the use of a selection procedure?

A. No. The use of the selection procedure must be consistent with the validity evidence. For example, if a research study shows only that, at a given passing score the test satisfactorily screens out probable failures, the study would not justify the use of substantially different passing scores, or of ranked lists of those who passed. See Section 5G. Similarly, if the research shows that a battery is valid when a particular set of weights is used, the weights actually used must conform to those that were established by the research.

48. Q. Do the Guidelines call for a user to consider and investigate alternative selection procedures when conducting a validity study?

A. Yes. The Guidelines call for a user, when conducting a validity study, to make a reasonable effort to become aware of suitable alternative selection procedures and methods of use which have as little adverse impact as possible, and to investigate those which are suitable. Section 3B.

An alternative procedure may not previously have been used by the user for the job in question and may not have been extensively used elsewhere. Accordingly, the preliminary determination of the suitability of the alternative selection procedure for the user and job in question may have to be made on the basis of incomplete information. If on the basis of the evidence available, the user determines that the alternative selection procedure is likely to meet its legitimate needs, and is likely to have less adverse impact than the existing selection procedure, the alternative should be investigated further as a part of the validity study. The extent of the investigation should be reasonable. Thus, the investigation should continue until the user has reasonably concluded that the alternative is not useful or not suitable, or until a study of its validity has been completed. Once the full validity study has been completed, including the evidence concerning the alternative procedure, the user should evaluate the results of the study to determine which procedure should be used. See Section 3B and Question 50.

49. Q. Do the Guidelines call for a user *continually* to investigate "suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible"?

A. No. There is no requirement for continual investigation. A reasonable investigation of alternatives is called for by the Guidelines as a part of any validity study. Once the study is complete and validity has been found, however, there is generally no obligation to conduct further investigations, until such time as a new study is called for. See, Sections 3B and 5K. If a government agency, complainant, civil rights organization or other person having a legitimate 'interest shows such a user an alternative procedure with less adverse impact and with substantial evidence of validity for the same job in similar circumstances, the user is obliged to investigate only the particular procedure which has been presented. Section 3B.

50. Q. In what circumstances do the Guidelines call for the use of an alternative selection procedure or an alternative method of using the procedure?

A. The alternative selection procedure (or method of use) should be used when it has less adverse impact and when the evidence shows that its validity is substantially the same or greater for the same job in similar circumstances. Thus, if under the original selection procedure the selection rate for black applicants was only one half (50 percent) that of the selection rate for white applicants, whereas under the alternative selection procedure the selection rate for blacks is two-thirds (67 percent) that of white applicants, the new alternative selection procedure should be used when the evidence shows substantially the same or greater validity for the alternative than for the original procedure. The same principles apply to a new user who is deciding what selection procedure to institute.

51. Q. What are the factors to be considered in determining whether the validity for one procedure is substantially the same as or greater than that of another procedure?

A. In the case of a criterion-related validity study, the factors include the importance of the criteria for which significant relationships are found, the magnitude of the relationship between selection procedure scores and criterion measures, and the size and composition of the samples used. For content validity, the strength of validity evidence would depend upon the proportion of critical and/or important job behaviors measured, and the extent to which the selection procedure resembles actual work samples or work behaviors. Where selection procedures have been validated by different strategies, or by construct validity, the determination should be made on a case by case basis.

52. Q. The Guidelines require consideration of alternative procedures and alternative methods of use, in light of the evidence of validity and utility and the degree of adverse impact

of the procedure. How can a user know that any selection procedure with an adverse impact is lawful?

A. The Uniform Guidelines (Section 5G) expressly permit the use of a procedure in a manner supported by the evidence of validity and utility, even if another method of use has a lesser adverse impact. With respect to consideration of alternative selection procedures, if the user made a reasonable effort to become aware of alternative procedures, has considered them and investigated those which appear suitable as a part of the validity study, and has shown validity for a procedure, the user has complied with the Uniform Guidelines. The burden is then on the person challenging the procedure to show that there is another procedure with better or substantially equal validity which will accomplish the same legitimate business purposes with less adverse impact. Section 3B. See also, *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405.

53. Q. Are the Guidelines consistent with the decision of the Supreme Court in *Furnco Construction Corp.* v. *Waters,* ____ U.S. ____, 98 S.Ct. 2943 (1978) where the Court stated: "Title VII * * * does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

A. Yes. The quoted statement in *Furnco* v. *Waters* was made on a record where there was no adverse impact in the hiring process, no different treatment, no intentional discrimination, and no contractual obligations under E.O. 11246. Section 3B of the Guidelines is predicated upon a finding of adverse impact. Section 3B indicates that, when two or more selection procedures are available which serve a legitimate business purpose with substantially equal validity, the user should use the one which has been demonstrated to have the lesser adverse impact. Part V of the Overview of the Uniform Guidelines, in elaborating on this principle, states: "Federal equal employment opportunity law has added a requirement to the process of validation. In conducting a validation study, the employer should consider available alternatives which will achieve its legitimate purpose with lesser adverse impact."

Section 3B of the Guidelines is based on the principle enunciated in the Supreme Court decision in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975) that, even where job relatedness has been proven, the availability of other tests or selection devices which would serve the employer's legitimate interest in "efficient and trustworthy workmanship" without a similarly undesirable racial effect would be evidence that the employer was using its tests merely as a pretext for discrimination.

Where adverse impact still exists, even though the selection procedure has been validated, there continues to be an obligation to consider alternative procedures which reduce or remove that adverse impact if an opportunity presents itself to do so without sacrificing validity. Where there is no adverse impact, the *Furnco* principle rather than the *Albemarle* principle is applicable.

IV. *Technical Standards*

54. Q. How does a user choose which validation strategy to use?

A. A user should select a validation strategy or strategies which are (1) appropriate for the type of selection procedure, the job, and the employment situation, and (2) technically and administratively feasible. Whatever method of validation is used, the basic logic is one of prediction; that is, the presumption that level of performance on the selection procedure will, on the average, be indicative of level of performance on the job after selection. Thus, a criterion-related study, particularly a predictive one, is often regarded as the closest to such an ideal. See American Psychological Association *Standards,* pp. 26-27.

Key conditions for a criterion-related study are a substantial number of individuals for inclusion in the study, and a considerable range of performance on the selection and criterion measures. In addition, reliable and valid measures of job per-

formance should be available, or capable of being developed. Section 14B(1). Where such circumstances exist, a user should consider use of the criterion-related strategy.

Content validity is appropriate where it is technically and administratively feasible to develop work samples or measures of operationally defined skills, knowledges, or abilities which are a necessary prerequisite to observable work behaviors. Content validity is not appropriate for demonstrating the validity of tests of mental processes or aptitudes or characteristics; and is not appropriate for knowledges, skills or abilities which an employee will be expected to learn on the job. Section 14C(1).

The application of a construct validity strategy to support employee selection procedures is newer and less developed than criterion-related or content validity strategies. Continuing research may result in construct validity becoming more widely used. Because construct validity represents a generalization of findings, one situation in which construct validity might hold particular promise is that where it is desirable to use the same selection procedures for a variety of jobs. An overriding consideration in whether or not to consider construct validation is the availability of an individual with a high level of expertise in this field.

In some situations only one kind of validation study is likely to be appropriate. More than one strategy may be possible in other circumstances, in which case administrative considerations such as time and expense may be decisive. A combination of approaches may be feasible and desirable.

55. Q. Why do the Guidelines recognize only content, construct and criterion-related validity?

A. These three validation strategies are recognized in the Guidelines since they represent the current professional consenus. If the professional community recognizes new strategies

or substantial modifications of existing strategies, they will be considered and, if necessary, changes will be made in the Guidelines, Section 5A.

56. Q. Why don't the Uniform Guidelines state a preference for criterion-related validity over content of construct validity?

A. Generally accepted principles of the psychological profession support the use of criterion-related content or construct validity strategies as appropriate. American Psychological Association *Standards,* E, pp. 25-26. This use was recognized by the Supreme Court in *Washington* v. *Davis,* 426 U.S. 229, 247, fn. 13. Because the Guidelines describe the conditions under which each validity strategy is inappropriate, there is no reason to state a general preference for any one validity strategy.

57. Q. Are the Guidelines intended to restrict the development of new testing strategies, psychological theories, methods of job analysis or statistical techniques?

A. No. The Guidelines are concerned with the validity and fairness of selection procedures used in making employment decisions, and are not intended to limit research and new developments. See Question 55.

58. Q. Is a full job analysis necessary for all validity studies?

A. It is required for all content and construct studies, but not for all criterion-related studies. See Sections 14A and 14B(2). Measures of the results or outcomes of work behaviors such as production rate of error rate may be used without a full job analysis where a review of information about the job shows that these criteria are important to the employment situation of the user. Simiarly, measures such as absenteeism, tardiness or turnover may be used without a full job analysis if these behaviors are shown by a review of information about the job to be important in the specific situation. A rating of overall job performance may be used without a full job analysis only if the user can demonstrate its appropriateness for the specific job and

employment situation through a study of the job. The Supreme Court held in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), that measures of overall job performance should be carefully developed and their use should be standardized and controlled.

59. Q. Section 5J on interim use requires the user to have available substantial evidence to validity. What does this mean?

A. For purposes of compliance with 5J, "substantial evidence" means evidence which may not meet all the validation requirements of the Guidelines but which raises a strong inference that validity pursuant to these standards will soon be shown. Section 5J is based on the proposition that it would not be an appropriate allocation of Federal resources to bring enforcement proceedings against a user who would soon be able to satisfy fully the standards of the Guidelines. For example, a criterion-related study may have produced evidence which meet almost all of the requirements of the Guidelines with the exception that the gathering of the data of test fairness is still in progress and the fairness study has not yet produced results. If the correlation coefficient for the group as a whole permits the strong inference that the selection procedure is valid, then the selection procedure may be used on an interim basis pending the completion of the fairness study.

60. Q. What are the potential consequences to a user when a selection procedure is used on an interim basis?

A. The fact that the Guidelines permit interim use of a selection procedure under some conditions does not immunize the user from liability for back pay, attorney fees and the like, should use of the selection procedure later be found to be in violation of the Guidelines. Section 5J. For this reason, users should take steps to come into full compliance with the Guidelines as soon as possible. It is also appropriate for users to consider ways of minimizing adverse impact during the period of interim use.

61. Q. Must provisions for retesting be allowed for job-knowledge tests, where knowledge of the test content would assist in scoring well on it the second time?

A. The primary intent of the provision for retesting is that an applicant who was not selected should be given another chance. Particularly in the case of job-knowledge tests, security precautions may preclude retesting with the same test after a short time. However, the opportunity for retesting should be provided for the same job at a later time, when the applicant may have acquired more of the relevant job knowledges.

62. Q. Under what circumstances may a selection procedure be used for ranking?

A. Criterion-related and construct validity strategies are essentially empirical, statistical processes showing a relationship between performance on the selection procedure and performance on the job. To justify ranking under such validity strategies, therefore, the user need show mathematical support for the proposition that persons who receive higher scores on the procedure are likely to perform better on the job.

Content validity, on the other hand, is primarily a judgmental process concerned with the adequacy of the selection procedure as a sample of the work behaviors. Use of a selection procedure on a ranking basis may be supported by content validity if there is evidence from job analysis or other empirical data that what is measured by the selection procedure is associated with differences in levels of job performance. Section 14C(9); see also Section 5G.

Any conclusion that a content validated procedure is appropriate for ranking must rest on an inference that higher scores on the procedure are related to better job performance. The more closely and completely the selection procedure approximates the important work behaviors, the easier it is to make such an inference. Evidence that better performance on

the procedure is related to greater productivity or to performance of behaviors of greater difficulty may also support such an inference.

Whether the content and context of the selection procedure are unlike those of the job as, for example, in many paper-and-pencil job knowledge tests, it is difficult to infer an association between levels of performance on the procedure and on the job. To support a test of job knowledge on a content validity basis, there must be evidence of a specific tie-in between each item of knowledge tested and one or more work behaviors. See Question 79. To justify use of such a test for ranking, it would also have to be demonstrated from empirical evidence either that mastery of more difficult work behaviors, or that mastery of a greater scope of knowledge corresponds to a greater scope of important work behaviors.

For example, for a particular warehouse worker job, the job analysis may show that lifting a 50-pound object is essential, but the job analysis does not show that lifting heavier objects is essential or would result in significantly better job performance. In this case a test of ability to lift 50 pounds could be justified on a content validity basis for a pass/fail determination. However, ranking of candidates based on relative amount of weight that can be lifted would be inappropriate.

In another instance, a job analysis may reflect that, for the job of machine operator, reading of simple instructions is not a major part of the job but is essential. Thus, reading would be a critical behavior under the Guidelines. See Section 14C(8). Since the job analysis in this example did not also show that the ability to read such instructions more quickly or to understand more complex materials would be likely to result in better job performance, a reading test supported by content validity alone should be used on a pass/fail rather than a ranking basis. In such circumstances, use of the test for ranking would have to be supported by evidence from a criterion-related (or construct) validity study.

On the other hand, in the case of a person to be hired for a typing pool, the job analysis may show that the job consists almost entirely of typing from manuscript, and that productivity can be measured directly in terms of finished typed copy. For such a job, typing constitutes not only a critical behavior, but it constitutes most of the job. A higher score on a test which measured words per minute typed, with adjustments for errors, would therefore be likely to predict better job performance than a significantly lower score. Ranking or grouping based on such a typing test would therefore be appropriate under the Guidelines.

63. Q. If selection procedures are administered by an employment agency or a consultant for an employer, is the employer relieved of responsibilities under the Guidelines?

A. No. The employer remains responsible. It is therefore expected that the employer will have sufficient information available to show: (a) What selection procedures are being used on its behalf; (b) the total number of applicants for referral by race, sex and ethnic group; (c) the number of persons, by race, sex and ethnic group, referred to the employer, and (d) the impact of the selection procedures and evidence of the validity of any such procedure having an adverse impact as determined above.

A. *Criterion-Related Validity*

[Questions and Answers Nos. 64-71 omitted in printing].

72. Q. What options does a user have if a criterion-related study is appropriate but is not feasible because there are not enough persons in the job?

A. There are a number of options the user should consider, depending upon the particular facts and circumstances, such as:

1. Change the procedure so as to eliminate adverse impact (see Section 6A);

2. Validate a procedure through a content validity stragey, if appropriate (see Section 14C and Questions 54 and 74);

3. Use a selection procedure validated elsewhere in conformity with the Guidelines (see Sections 7-8 and Question 66);

4. Engage in a cooperative study with other facilities or users (in cooperation with such users either bilaterally or through industry or trade associations or governmental groups), or participate in research studies conducted by the state employment security system. Where different locations are combined, care is needed to insure that the jobs studied are in fact the same and that the study is adequate and in conformity with the Guidelines (see Sections 8 and 14 and Question 45).

5. Combine essentially similar jobs into a single study sample. See Section 14B(1).

B. *Content Validity*

73. Q. Must a selection procedure supported by content validity be an actual "on the job" sample of work behaviors?

A. No. The Guidelines emphasize the importance of a close approximation between the content of the selection procedure and the observable behaviors or products of the job, so as to minimize the inferential leap between performance on the selection procedure and job performance. However, the Guidelines also permit justification on the basis of content validity of selection procedures measuring knowledges, skills, or abilities which are not necessarily samples of work behaviors if: (1) The knowledge, skill, or ability being measured is operationally defined in accord with Section 14C(4); and (2) that knowledge, skill, or ability is a prerequisite for critical or important work behaviors. In addition users may justify a requirement for training, or for experience obtained from prior employment or volunteer work, on the basis of content validity, even though the prior training or experience does not duplicate the job. See Section 14B(6).

74. Q. Is the use of a content validity strategy appropriate for a procedure measuring skills or knowledges which are taught in training after initial employment?

A. Usually not. The Guidelines state (Section 14C(1)) that content validity is not appropriate where the selection procedure involves knowledges, skills, or abilities which the employee will be expected to learn "on the job". The phrase "on the job" is intended to apply to training which occurs after hiring, promotion or transfer. However, if an ability, such as speaking and understanding a language, takes a substantial length of time to learn, is required for successful job performance, and is not taught to those initial hires who possess it in advance, a test for that ability may be supported on a content validity basis.

75. Q. Can a measure of a trait or construct be validated on the basis of content validity?

A. No. Traits or constructs are by definition underlying characteristics which are intangible and are not directly observable. They are therefore not appropriate for the sampling approach of content validity. Some selection procedures, while labeled as construct measures, may actually be samples of observable work behaviors. Whatever the label, if the operational definitions are in fact based upon observable work behaviors, a selection procedure measuring those behaviors may be appropriately supported by a content validity strategy. For example, while a measure of the construct "dependability" should not be supported on the basis of content validity, promptness and regularity of attendance in a prior work record are frequently inquired into as a part of a selection procedure, and such measures may be supported on the basis of content validity.

76. Q. May a test which measures what the employee has learned in a training program be justified for use in employment decisions on the basis of content validity?

A. Yes. While the Guidelines (Section 14C(1)) note that content validity is not an appropriate strategy for knowledges, skills or abilities which an employee "will be expected to learn on the job", nothing in the Guidelines suggests that a test supported by content validity is not appropriate for determining what the employee has learned on the job, or in a training program. If the content of the test is relevant to the job, it may be used for employment decisions such as retention or assignment. See Section 14C(7).

77. Q. Is a task analysis necessary to support a selection procedure based on content validity?

A. A description of all tasks is not required by the Guidelines. However, the job analysis should describe all important work behaviors and their level of difficulty. Sections 14C(2) and 15C(3). The job analysis should focus on observable work behaviors and, to the extent appropriate, observable work products, and the tasks associated with the important observable work behaviors and/or work products. The job analysis should identify how the critical or important work behaviors are used in the job, and should support the content of the selection procedure.

78. Q. What is required to show the content validity of a paper-and-pencil test that is intended to approximate work behaviors?

A. Where a test is intended to replicate a work behavior, content validity is established by a demonstration of the similarities between the test and the job with respect to behaviors, products, and the surrounding environmental conditions. Section 14B(4).

Paper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper and pencil form (e.g., editing and bookkeeping). Paper-and-pencil tests of effectiveness in interpersonal relations (e.g., sales or supervision), or of physical

activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are not close enough approximations of work behaviors to show content validity.

The appropriateness of tests of job knowledge, whether or not in pencil and paper form, is addressed in Question 79.

79. Q. What is required to show the content validity of a test of a job knowledge?

A. There must be a defined, well recognized body of information, and knowledge of the information must be prerequisite to performance of the required work behaviors. The work behavior(s) to which each knowledge is related should be identified on an item by item basis. The test should fairly sample the information that is actually used by the employee on the job, so that the level of difficulty of the test items should correspond to the level of difficulty of the knowledge as used in the work behavior. See Section 14C(1) and (4).

80. Q. Under content validity, may a selection procedure for entry into a job be justified on the grounds that the knowledges, skills or abilities measured by the selection procedure are prerequisites to successful performance in a training program?

A. Yes, but only if the training material and the training program closely approximate the content and level of difficulty of the job and if the knowledges, skills or abilities are not those taught in the training program. For example, if training materials are at a level of reading difficulty substantially in excess of the reading difficulty of materials used on the job, the Guidelines would not permit justification on a content validity basis of a reading test based on those training materials for entry into the job.

Under the Guidelines a training program itself is a selection procedure if passing it is a prerequisite to retention or advancement. See Section 2C and 14C(17). As such, the content of the

training program may only be justified by the relationship between the program and critical or important behaviors of the job itself, or through a demonstration of the relationship between measures of performance in training and measures of job performance.

Under the example given above, therefore, where the requirements in the training program itself could not be validated on a content validity basis if passing it is a basis for retention or promotion.

C. *Construct Validity*

[Question and Answer No. 81 omitted in printing.]

V. *Records and Documentation*

82. Q. Do the Guidelines have simplified recordkeeping for small users (employers who employ one hundred or fewer employees and other users not required to file EEO-1, *et seq.* reports)?

A. Yes. Although small users are fully covered by Federal equal employment opportunity law, the Guidelines have reduced their record-keeping burden. See option in Section 15A(1). Thus, small users need not make adverse impact determinations nor are they required to keep applicant data on a job-by-job basis. The agencies also recognize that a small user may find that some or all validation strategies are not feasible. See Question 54. If a small user has reason to believe that its selection procedures have adverse impact and validation is not feasible, it should consider other options. See Sections 7A and 8 and Questions 31, 36, 45, 66, and 72.

83. Q. Is the requirement in the Guidelines that users maintain records of the race, national origin, and sex of employees and applicants constitutional?

A. Yes. For example, the United States Court of Appeals for the First Circuit rejected a challenge on constitutional and other grounds to the Equal Employment Opportunity Commission regulations requiring State and local governmental units to furnish information as to race, national origin and sex of employees. *United States* v. *New Hampshire,* 539 F. 2d 277 (1st Cir. 1976), *cert. denied,* sub nom. *New Hampshire* v. *United States,* 429 U.S. 1023. The Court held that the recordkeeping and reporting requirements promulgated unter Title VII of the Civil Rights Act of 1964, as ammended, were reasonably necessary for the Federal agency to determine whether the state was in compliance with Title VII and thus were authorized and constitutional. The same legal principles apply to recordkeeping with respect to applicants.

Under the Supremacy Clause of the Constitution, the Federal law requiring maintenance of records identifying race, sex and national origin overrides any contrary provision of State law. See Question 8.

The agencies recognize, however, that such laws have been enacted to prevent misuse of this information. Thus, employers should take appropriate steps to ensure proper use of all data. See Question #88.

84. Q. Is the user obliged to keep records which show whether its selection processes have an adverse impact on race, sex, or ethnic group?

A. Yes. Under the Guidelines users are obligated to maintain evidence indicating the impact which their selection processes have on identifiable race, sex or ethnic groups. Sections 4A and B. If the selection process for a job does have an adverse impact on one or more such groups, the user is expected to maintain records showing the impact for the individual procedures. Section 15A(2).

85. Q. What are the recordkeeping obligations of a user who cannot determine whether a selection process for a job has adverse impact because it makes an insufficient number of selections for that job in a year?

A. In such circumstances the user should collect, maintain, and have availaable information on the impact of the selection process and the component procedures until it can determine that adverse impact does not exist for the overall process or until the job has changed substantially. Section 15A(2)(c).

86. Q. Should applicant and selection information be maintained for race or ethnic groups constituting less than 2% of the labor force and the applicants?

A. Small employers and other small users are not obliged to keep such records. Section 15A(1). Employers with more than 100 employees and other users required to file EEO-1 *et seq.* reports should maintain records and other information upon which impact determinations couild be made, because section 15A2 requires the maintenance of such information for "any of the groups for which records are called for by section 4B above." See also, Section 4A.

No user, regardless of size, is required to make adverse impact determinations for race or ethnic groups constituting less than 2% of the labor force and the applicants. See Question 16.

87. Q. Should information be maintained which identifies applicants and persons selected both by sex and by race or ethnic group?

A. Yes. Although the Federal agencies have decided not to require computations of adverse impact by sub-groups (white males, black males, white females, black females—see Question 17), the Guidelines call for recordkeeping which allows identification of persons by sex, combined with race or ethnic group, so as to permit the identification of discriminatory practices on any such basis. Section 4A and 4B.

88. Q. How should a user collect data on race, sex or ethnic classifications for purposes of determining the impact of selection procedures?

A. The Guidelines have not specified any particular procedure, and the enforcement agencies will accept different procedures that capture the necessary information. Where applications are made in person, a user may maintain a log or applicant flow chart based upon visual observation, identifying the number of persons expressing an interest, by sex and by race or national origin; may in some circumstances rely upon personal knowledge of the user; or may rely upon self-identification. Where applications are not made in person and the applicants are not personally known to the employer, self-identification may be appropriate. Wherever a self-identification form is used, the employer should advise the applicant that identification by race, sex and national origin is sought, not for employment decisions, but for record-keeping in compliance with Federal law. Such self-identification forms should be kept separately from the application, and should not be a basis for employment decisions; and the applicants should be so advised. See Secion 4B.

89. Q. What information should be included in documenting a validity study for purposes of these Guidelines?

A. Generally, reports of validity studies should contain all the information necessary to permit an enforcement agency to conclude whether a selection procedure has been validated. Information that is critical to this determination is denoted in Section 15 of the Guidelines by the word "(essential)".

Any reports completed after September 25, 1978, (the effective date of the Guidelines) which do not contain this information will be considered incomplete by the agencies unless there is good reason for not including the information. Users should therefore prepare validation reports according to the format of

Section 15 of the Guidelines, and should carefully document the reasons if any of the information labeled "(essential)" is missing.

The major elements for all types of validation studies include the following:

When and where the study was conducted.

A description of the selection procedure, how it is used, and the results by race, sex, and ethnic group.

How the job was analyzed or reviewed and what information was obtained from this job analysis or review.

The evidence demonstrating that the selection procedure is related to the job. The nature of this evidence varies, depending upon the strategy used.

What alternative selection procedures and alternative methods of using the selection procedure were studied and the results of this study.

The name, address and telephone number of a contact person who can provide further information about the study.

The documentation requirements for each validation strategy are set forth in detail in Section 15 B, C, D, E, F, and G. Among the requirements for each validity strategy are the following:

1. *Criterion-Related Validity*

A description of the criterion measures of job performance, how and why they were selected, and how they were used to evaluate employees.

A description of the sample used in the study, how it was selected, and the size of each race, sex, or ethnic group in it.

A description of the statistical methods used to determine whether scores on the selection procedure are related to scores

on the criterion measures of job performance, and the results of these statistical calculations.

2. *Content Validity*

The content of the job, as identified from the job analysis.

The content of the selection procedure.

The evidence demonstrating that the content of the selection procedure is a representative sample of the content of the job.

3. *Construct Validity*

A definition of the construct and how it relates to other constructs in the psychological literature.

The evidence that the selection procedure measures the construct.

The evidence showing that the measure of the construct is related to work behaviors which involve the construct.

90. Q. Although the records called for under "Source Data", Section 15B(11) and section 15D(11), are not listed as "Essential", the Guidelines state that each user should maintain such records, and have them available upon request of a compliance agency. Are these records necessary? Does the absence of complete records preclude the further use of research data compiled prior to the issuance of the Guidelines?

A. The Guidelines require the maintenance of these records in some form "as a necessary part of the study." Section 15A(3)(c). However, such records need not be compiled or maintained in any specific format. The term"Essential" as used in the Guidelines refers to information considered essential to the validity report. Section 15A(3)(b). The Source Data records need not be included with reports of validation or other formal reports until and unless they are specifically requested by a com-

pliance agency. The absence of complete records does not preclude use of research data based on those records that are available. Validation studies submitted to comply with the requirements of the Guidelines may be considered inadequate to the extent that important data are missing or there is evidence that the collected data are inaccurate.

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No. 80-29

SEP 11 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF ST. LOUIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the court of appeals properly enjoined petitioners from using a particular employment test, which had a disparate racial impact, when petitioners had failed to establish the validity of the test at an evidentiary hearing.

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*Additional petitioners are: Frank C. Cummings, Acting Chairman of the Civil Service Commission of the City of St. Louis; Fred Gould, a member of the Civil Service Commission,

2. Whether the totality of the circumstances justified the order of the court of appeals which required that petitioners immediately promote eligible employees from firefighter to fire captain, at a rate reflecting the proportion of blacks in the firefighter rank, using the results of that portion of the employment test which, although not validated, was the most closely job-related criterion available.

City of St. Louis; Charles Marino, Director, Department of Public Safety, City of St. Louis; Denis D. Broderick, individually and in his capacity as Fire Chief of the City of St. Louis; R. Elliott Scearce, individually and in his capacity as Director of the Department of Personnel, City of St. Louis.

Additional respondents are: Firefighters Institute for Racial Equality, a corporation; George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, Eugene Stanton, Preston Sims, each individually and on behalf of all other persons similarly situated; Joseph Blessing, Michael Davis, Robert Crowley, David Banta, Andrew Rios, George Hohmann, Don Blackwell, Nick Altmeyer and George Tschlis, each individually and as members of a class; Roland Ralston and William O. Hill.

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44 Fed. Reg. 11996 (1979) 1

OPINIONS BELOW

The opinion of the court of appeals, as modified on denial of the petitions for rehearing (Pet. App. A-1 to A-29), is reported at 616 F.2d 350. The opinion of the district court (Pet. App. A-30 to A-39) is reported at 470 F. Supp. 1281.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1980. On April 9, 1980, the petitions for rehearing were denied and a modified opinion was entered. The petition for a writ of certiorari was filed on July 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38309 (1978), 28 C.F.R. 50.14 *et seq.*, 29 C.F.R. 1607, and the Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996 (1979), are reproduced at Pet. App. A-82 to A-189.

STATEMENT

This is the third petition for certiorari to be filed in this protracted litigation. The two earlier petitions were denied. See *Banta* v. *FIRE*, 443 U.S. 904 (1979), *Banta* v. *United States*, 434 U.S. 819 (1977).

1. The United States brought this action against petitioners, the City of St. Louis and several municipal officials, on March 18, 1974, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The United States alleged that petitioners had engaged in a continuing pattern and practice of racial discrimination in employment with respect to the administration of the St. Louis Fire Department. The government's suit was consolidated with an action that had previously been brought by the Firefighters Institute for Racial Equality ("FIRE") and several individual black firefighters and job applicants.

The consolidated cases were tried in May 1975, and a final judgment was entered on June 28, 1976. *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).[1] The court found, in accordance with the terms of a partial consent decree, that petitioners' examination for entry level firefighter positions had a disparate impact on black applicants and had not been validated. The court enjoined further use of that test and ordered petitioners to hire blacks to fill 50% of all entry level positions for five years (418 F. Supp. at 384). This goal was imposed "to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City * * *" (*ibid.*). In all other respects, including the government's challenge to petitioners' promotion

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[1] A group of white firefighters and job applicants intervened in both cases. The court's judgment of June 28, 1976 supplemented an earlier judgment that the court had entered on April 9, 1976. See *United States* v. *City of St. Louis*, 410 F. Supp. 948 (E.D. Mo. 1976).

practices, the court entered judgment for petitioners. The United States and FIRE appealed.

The court of appeals reversed the judgment of the district court on the question of discrimination in promotions from firefighter to fire captain. *FIRE* v. *City of St. Louis*, 549 F.2d 506 (8th Cir. 1977) (Pet. App. A–55 to A–73). The court of appeals held that the 1974 fire captain test had a disparate racial impact on blacks and had not been properly validated (*id.* at A–57 to A–68).[2] A petition for certiorari was denied (*Banta* v. *United States*, 434 U.S. 819 (1977)).

The district court entered two orders on remand. In its first order, which was entered on October 21, 1977, the court enjoined petitioners from engaging in any racially discriminatory practices with respect to fire captain promotions and further ordered petitioners to develop and validate a new fire captain test (Pet. App. A–42 to A–43). In the interim, the court enjoined petitioners from making temporary or permanent appointments based on the 1974 fire captain test results, except that petitioners were allowed to promote persons who had passed the test, subject to the condition that 50% of the appointees would be black (*ibid.*). In fact, petitioners made no promotions in accordance with this procedure (*id.* at A–48 to A–49). Petitioners did not appeal the district court's order of October 21, 1977.

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[2]The court of appeals also reversed the district court's judgment concerning the Fire Department's segregated eating arrangements (Pet. App. A–68 to A–70), and it affirmed the lower court's finding that the examination for promotion from captain to battalion chief had no discriminatory impact (*id.* at A–70 to A–73).

On January 26, 1978, the district court vacated the October 21 order and prescribed a new procedure for interim promotions (Pet. App. A-74 to A-79). Under the revised procedure all firefighters who had served at least five years would be considered for promotion in order of seniority (*id.* at A-76). When a vacancy occurred, an assessment center technique[3] was to be used to evaluate the most senior white firefighter and the most senior black firefighter, with the promotion then being awarded to the person with the higher evaluation (*ibid.*). The unsuccessful candidate would continue to be eligible for promotion and would be evaluated for the next vacancy, together with the next most senior white and the next most senior black (*ibid.*). Unsuccessful candidates would continue to be evaluated along with two new candidates each time a vacancy occurred (*id.* at A-77).

FIRE appealed from the January 26 order, and the court of appeals reversed. *FIRE* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978) (Pet. App. A-40 to A-54). The court held that petitioners' failure to promote 12 blacks who had passed the 1974 test, as permitted by the district court's order of October 21, was "the continuation of a policy of discrimination against those black candidates for promotion who have been the victims of discrimination in the past" (*id.* at A-49). The court of appeals remanded the case with instructions that petitioners be required to promote the 12 black

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[3]The assessment center technique is "a selection procedure which uses individual and group exercises to simulate job responsibilities while assessors evaluate a candidate's performance" (Pet. App. A-44 n.4).

candidates who had passed the 1974 test, and that they also be allowed to promote 12 whites (*id.* at A-51 to A-52). To the extent practicable, half of all temporary captain positions were to be filled by blacks (*ibid.*). The court of appeals also ordered petitioners to develop and validate a new fire captain test by January 1, 1979 (*id.* at A-52). On December 19, 1978, the district court entered an order in accordance with the mandate (*id.* at A-80 to A-81).[4]

2. On December 29, 1978, petitioners submitted a validation report for a new fire captain test (Pet. App. A-4). The parties agreed that the test should first be administered to determine whether it had a disparate racial impact before litigating the issue of validity (*id.* at A-5).

The new test consisted of two parts, a 130-question written multiple choice exam, accounting for 30% of the maximum possible score, and a three-part assessment center evaluation, accounting for 70% of the score (Pet. App. A-4). The two parts of the test were administered on February 27 and April 9, 1979 (*id.* at A-5), and candidates were then ranked according to their combined scores (*id.* at A-14).

Without prior notice to the government or to FIRE, petitioners announced the results of the combined test, certified an eligibility list and commenced the promotion process on April 26, 1979 (Pet. App. A-5). After learning that petitioners had certified the eligibility list, government counsel contacted petitioners' attor-

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[4]The intervenors petitioned for certiorari, which was again denied. *Banta* v. *FIRE*, 443 U.S. 904 (1979).

neys and scheduled a meeting for the afternoon of April 30, based upon the assurances of petitioners' attorneys that promotions would not be made for at least a week (*id.* at A-6). On the morning of April 30, however, 16 white firefighters from the certified list were sworn in as fire captains (*ibid.*). Eight more promotions, including one black, were scheduled for the afternoon of April 30, and 24 promotions were scheduled for May 2 (*ibid.*). The government subsequently agreed to allow the April 30 promotions to go forward, subject to petitioners' agreement to refrain from further promotions (*ibid.*). The court thereafter entered a temporary restraining order preventing further promotions (*ibid.*).

The court subsequently heard extensive evidence concerning the validity of petitioners' test at a preliminary injunction hearing (Pet. App. A-25).[5] On June 4, 1979, the district court denied preliminary injunctive relief (*id.* at A-30). The district court found

[5] Petitioners attempted to establish the job-relatedness of the promotion test by means of a content validation study (Pet. App. A-12). Content validation is one of three recognized procedures for validating employment tests (*Washington* v. *Davis*, 426 U.S. 229, 247 n.13 (1976)), and is "[d]emonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job" (Uniform Guidelines on Employee Selection Procedures, Section 16D; Pet. App. A-144). The construction of a content valid test first requires a job analysis in which "important work behavior(s) required for successful performance and their relative importance" are identified and analyzed (Uniform Guidelines, Section 14C(2); Pet. App. A-132). The parties here agreed that an adequate job analysis had been completed for the fire captain test (Pet. App. A-13 n.13). The question at issue is whether the test was satisfactory in testing those job behaviors that the job analysis had identified.

that the government has established a prima facie case of racially disparate impact (*id.* at A-34),[6] but that petitioners had succeeded in validating the test (*id.* at A-39).

The government and FIRE appealed from the district court's order and the court of appeals again reversed (Pet. App. A-1 to A-29). While the court of appeals agreed that petitioners' test had a disparate impact on blacks, it held that the district court had erred in concluding that petitioners had validated the test (*id.* at A-10).

Because of the substantial dissimilarity between the multiple choice testing procedure and the actual work situation, the court of appeals concluded that greater evidence of validity was required than would be the case where a test closely mirrored actual job behavior (Pet. App. A-12 to A-19). The court noted the substantial possibility for error inherent in attempting to develop a written multiple choice exam to measure the complex behaviors, interpersonal skills and abilities to make decisions under pressure—the job skills required of fire captains—particularly where the exam is to be used as a ranking device for candidates (*id.* at A-17). The court concluded that "[n]othing in the record can be construed as empirical evidence of an association

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[6] If petitioners had been allowed to make promotions based on the test, whites would have been appointed to fill 58 of 62 vacancies. Thus, 16.7% of the 348 whites completing the test would have been promoted compared with four of the 56 blacks (7.1%) completing the test. The black selection rate would have been 42.5% that of whites, far below the 80% rule of thumb that the Uniform Guidelines (see note 7, *infra*) suggest for measuring disparate impact (Pet. App. A-10 to A-11).

between levels of performance on the multiple choice examination and on the job" (*id.* at A–15).[7]

While the court of appeals found that some portions of the assessment center part of the test complied more closely with the spirit of the Guidelines than did the multiple choice exam, it also noted significant deficiencies in the assessment center part (Pet. App. A–19 to A–23). The court of appeals concluded that even the best sections of the assessment center portion of the test "do not stand alone * * * [but] are a part of an overall selection procedure which we hold to be inconsistent with the Guidelines" (*id.* at A–23). Because of the deficiencies found in both parts of the exam, the court of appeals held that the district court erred in its assessment of plaintiffs' likelihood of success on the merits (*ibid.*).

The court of appeals then turned to the "very difficult" question of relief (Pet. App. A–24). Immediate relief was necessary, the court found, to ameliorate the effects of the 24 promotions that petitioners had made under the unvalidated test in April 1979, par-

[7] In articulating the validation standards required, and assessing whether petitioners had met them, the court of appeals relied on various provisions of the Uniform Guidelines on Employee Selection Procedures (Pet. App. A–86 to A–148) and the Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (*id.* at A–149 to A–189). Both the Guidelines and the Questions and Answers were promulgated jointly by the Civil Service Commission, the Department of Justice, the Equal Employment Opportunity Commission and the Department of Labor. The district court reached its conclusions on the test's validity without reference to the standards and procedures set forth in the Guidelines.

ticularly because of the Fire Department's history of racial discrimination and the continuing harm that was being caused to the careers of black firefighters (*id.* at A–23 to A–25). Recognizing that there was "no ideal solution" (*id.* at A–24), the court of appeals noted that the assessment center portion of the test came "the closest to comporting with the Guidelines and would, thus, be the fairest basis for the selection of the eight black firefighters" (*id.* at A–25). Consequently, the court of appeals ordered immediate promotion of those eight blacks who had scored highest on the assessment center portion of the test (*ibid.*).

Given the extensive—and ostensibly complete—evidence that the parties had presented in the district court concerning the validity of the test, the court of appeals held that its conclusions as to the validity of the test would be dispositive unless petitioners could present further noncumulative evidence on remand (Pet. App. A–25). For that reason, together with petitioners' immediate need for additional fire captains and the already protracted course that the litigation had taken, the court deemed it appropriate to grant further relief. The court ordered petitioners to fill then-existing vacancies, as well as the next 30 vacancies, on a 2:1 white to black ratio, the order of appointment to be based on the candidates' scores on the assessment center part of the test (*id.* at A–27 to A–28).

While reluctant to order appointments based on the unvalidated assessment center portion of the test, the court of appeals found it necessary to do so for several reasons: (1) the pressing need to restore the rank of

fire captain to full strength;[8] (2) the further disadvantage that black candidates for promotion to captain positions would inevitably suffer because of the requirement that fire captains serve five years in that rank before becoming eligible for promotion to battalion chief; (3) the existence of a pool of eligible candidates available for immediate promotion;[9] (4) petitioners' recalcitrance in resolving the problems; and (5) the probability that petitioners would develop a new test before more than 30 additional vacancies occurred (Pet. App. A–26 to A–27).[10]

ARGUMENT

1. The court of appeals properly enjoined further use of the 1979 fire captain test because it had been shown to have a disparate impact on blacks and was not properly validated.

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[8] Because of a change in the retirement system, the number of vacancies in the fire captain rank has been so great that 38 vacancies remained after the 24 promotions were made in April 1979. It is anticipated that a total of 120 vacancies (three-quarters of all captain positions) will have been filled during the two-year life of the eligibility list (Pet. App. A–27). By contrast, only 18 vacancies had originally been anticipated for the two-year life of the 1974 fire captain eligibility list (*id.* at A–57).

[9] All those who took the assessment center portion of the exam had completed five years in service as firefighters, received satisfactory efficiency ratings, and passed the multiple choice portion of the exam.

[10] If all 30 promotions are made as directed, blacks will hold 26% of the fire captain positions within the department (Pet. App. A–27 n.25). Presently, blacks hold 27% of the entry-level positions in the department (*id.* at A–25 n.22). Blacks account for 15% of those who took the 1979 test (*id.* at A–34).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that an employment test having a racially disparate impact violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, unless the employer can show that the test effectively selects those candidates who are most likely to perform well on the job.[11] The court of appeals properly applied this standard. Petitioners were unable to prevail in the court of appeals only because they were unable to show that the fire-captain test was job-related.[12]

Firefighters who took the fire captain test were ranked according to their test scores, and they were eligible for promotion in rank order (Pet. App. A–14). However, the court of appeals found no persuasive evidence that a candidate's test performance was a reliable indicator of his future job performance (*id.* at A–15). The court of appeals noted a number of specific deficiencies in the multiple choice portion of the test: (1) only 53 of the 130 questions were identified by the test developers as performance-differentiating (*id.* at A–18); (2) differentiations among candidates were based on answers to a relatively small number of questions in that 90% of the candidates correctly answered 30% of the questions, while 80% of the candidates correctly answered 50% of the questions (*ibid.*); (3) there

[11] This Court has also recognized that the Guidelines for Employee Selection Procedures are entitled to substantial deference. See *Griggs*, *supra*, 401 U.S. at 433–434; *Albemarle Paper Co.*, *supra*, 422 U.S. at 431.

[12] Petitioners do not contend that the courts below erred in holding the test has a racially disparate impact.

was no proof that the more difficult items correlated either in number or in degree of difficulty with the knowledge and skills thought to be performance-differentiating (*ibid.*); (4) 20 items were designed to test for the "'ability to size up a fire,'" an ability that can be tested only by methods closely approximating actual job conditions (*ibid.*); (5) several questions tested knowledge that was unnecessary for performance of the job (*id.* at A–19); (6) some questions were phrased in terms not commonly used by firefighters, while other questions were poorly drafted and difficult to understand (*ibid.*); and (7) the multiple choice exam as a whole was very dissimilar to the physical and stressful job of firefighter (*id.* at A–12). With respect to the assessment center part of the test, the court of appeals found that certain parts were very dissimilar to the actual work situation (*id.* at A–21 n.19).

Finally, the court of appeals concluded (Pet. App. A–23) that the fire captain test as a whole was inconsistent with the Uniform Guidelines[13] which, as petitioners acknowledge, "provide the general standard of validity" (Pet. 22).[14] Having failed to establish

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[13]The court referred to several provisions of the Uniform Guidelines, including Section 14C(9), which provides that a selection procedure used for ranking candidates, as here, "should measure those aspects of performance which differentiate among levels of job performance" (Pet. App. A–14 n.14). The court also referred to Section 14C(4), which provides that as "the setting and manner of the administration of the selection procedure less resemble the work situation, * * * the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity" (*id.* at A–13 n.11).

[14]Whatever merit it might have in another context, petitioners' contention that the court of appeals improperly relied on the Questions and Answers is irrelevant here, where the court

the job-relatedness of the fire captain test through proper validation, petitioners were thus properly enjoined from further use of the test.[15]

2. In cases of racial discrimination, this Court has recognized that the federal courts must grant relief that will eliminate the lingering effects of past discrimination, to the extent that it is possible to do so, as well as prevent future discrimination. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418. Given that principle and the posture of this case, on appeal for the third time after years of litigation that had

found serious deviations from the standards and procedures required by the Uniform Guidelines. At all events, administrative interpretations of agency regulations are entitled to deference. *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 433–434.

[15] Because both courts below treated as final the decision on the validity of the test (in the absence of additional evidence that petitioners might present on remand), the standards for issuing a preliminary injunction are not involved here. Petitioners seem to suggest (Pet. 13, 15, 16, 27, 28) that it was somehow improper for the court of appeals to have rendered a final decision on the merits. It is well established, however, that the courts of appeals have that authority even in an interlocutory appeal. *Jackson County, Mo.* v. *Jones*, 571 F.2d 1004, 1007 (8th Cir. 1978); *Yamamoto* v. *Omiya*, 564 F.2d 1319, 1325 n.11 (9th Cir. 1977). It is particularly appropriate for a court of appeals to reach the merits where, as here, the litigation has been protracted, the district court has reached the merits, and the issues have been clearly defined and fully litigated. *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). Indeed, petitioners do not contend that they had any evidence of validity that they were prevented from presenting. Nor do they assert that the court of appeals was incorrect in concluding that the district court had also treated the matter as a final decision with respect to the test's validity. At all events, petitioners have not been prejudiced in any way. The court of appeals expressly provided that petitioners should have the opportunity to reopen the question of test validity if they have further evidence to present on remand (Pet. App. A–25).

failed to resolve the problem of promotion discrimination within the St. Louis Fire Department, it is clear that the court of appeals did not abuse its discretion by ordering the interim and long term relief that it did. Nor did the decision of the court of appeals conflict with any decisions of this or any other court.

Petitioners do not contest the theoretical propriety of providing for numerically-based interim relief in Title VII cases (Pet. 9), and they recognize that federal courts have regularly fashioned such relief (*ibid.*). See, *e.g.*, *United States* v. *City of Miami, Fla.*, 614 F.2d 1322 (5th Cir. 1980), petition for rehearing granted (Aug. 26, 1980).[16] Instead, petitioners urge that this Court review the "almost bewildering variety of ratios and rationales" (Pet. 9) that the courts have employed in fashioning relief in Title VII cases. It is both necessary and proper, however, that remedial decrees should differ from case to case because it is the essence of equity jurisdiction that a remedy must be fashioned to fit the facts once a violation of the law has been established. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The federal courts have long recognized both the "highly individualistic nature" of remedial decrees (*Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 643 (4th Cir. 1978)), and

[16] Indeed, it may be an abuse of discretion not to award affirmative relief in the face of a finding of racial discrimination in employment. *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir.) (en banc), cert. denied, 419 U.S. 895 (1974)); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972). At all events, as the Chief Justice has recently said, "Where federal antidiscrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 31.

the need for flexibility in formulating relief in complex racial discrimination cases where emotions run high (*Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371, 374 (3d Cir. 1974)). A scientific basis for choosing a particular mode of relief need not be demonstrated (*Vulcan Society of N.Y. City Fire Dep't, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 398–399 (2d Cir. 1973)), and various mechanisms for affording relief may be appropriate in a particular case (*Morrow* v. *Crisler*, *supra*, 491 F.2d at 1056; *Castro* v. *Beecher*, 459 F.2d 725, 737 (1st Cir. 1972)).

Despite the inherent logic and vast authority supporting flexible relief formulas,[17] petitioners contend that this case warrants review because the court of appeals erred in choosing the specific numbers that it chose (Pet. 13). If all promotions are made pursuant to the court of appeals' decision, 26% of petitioners' fire captains will be black (Pet. App. A–27 n.25), while 27% of the firefighters rank is presently black (*id.* at A–25 n.22). Petitioners contend that the court of appeals erred in selecting a percentage greater than 15%, which is the percentage that reflects the black contingent among those firefighters who took the 1979 examination (Pet. 13). Petitioners assert that the percentage adopted by the court of appeals demonstrates "a significant departure from the norms of affirmative relief under Title VII" (*id.* at 14). That contention also lacks merit.

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[17] In fact, the government suggested a formula that was different from that which the court of appeals adopted (Pet. App. A–8 to A–9).

The interim relief ordered by the court of appeals must be viewed in light of the fact that this case was then before that court for the third time. On the first appeal, the court had directed petitioners to develop and validate a new test for fire captains. On the second appeal, the court noted petitioners' failure to develop that test, as well as petitioners' intransigence in refusing to take any appropriate interim steps to end discrimination. At that juncture, the court ordered certain minimal interim relief and again required the development of a new test. On the third appeal, the court found that petitioners had still failed to produce a validated test. In these circumstances, the court of appeals did not abuse its discretion in declining to afford petitioners yet another extension of time in which to begin providing black firefighters with the rights guaranteed by Title VII.[18]

The court of appeals' decree must also be viewed in light of petitioners' historic practice of entry level racial discrimination and of recent changes in the retirement system, whereby approximately three-fourths of all fire captains will have to be selected in the immediate future (Pet. App. A–26). Given the large number of vacancies that presently exist, together with those that will open up in the near future, it is obvious that few vacancies can be expected to occur beyond the short run. Moreover, while the rank of firefighters is now 27% black (*id.* at A–25 n.22)—due

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[18] Indeed, the Fifth Circuit recently cited the history of this litigation as an example of "the delay in ending discrimination that can be caused by protracted litigation" (*United States* v. *City of Miami, Fla., supra*, 614 F.2d at 1334 n.23).

to the relief required by the 1976 finding of entry level discrimination[19]—the requirement that persons serve five years as firefighters before taking the captain test (Pet. App. A–27)[20] resulted in the fact that only 15% of those taking the 1979 test were black (Pet. 13). Given the unprecedented number of vacancies in the rank of captain, the court of appeals could not ignore petitioners' historic practice of entry level discrimination if its decree were to succeed in overcoming the effects of past discrimination in the foreseeable future. *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 697 (6th Cir. 1979), petition for cert. pending, No. 79–1080 (filed Jan. 10, 1980). See also *Patterson* v. *Newspaper and Mail Deliverers Union*, 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976).[21]

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[19] Even the 27% figure probably underrepresents blacks because petitioners have not yet reached the end of the five year period during which the hiring goal was to apply. *United States* v. *City of St. Louis*, 418 F. Supp. 383 (E.D. Mo. 1976).

[20] In 1976, blacks accounted for only 11% of the Department's total uniformed force. *United States* v. *City of St. Louis*, 410 F. Supp. 948, 951 (E.D. Mo. 1976). In 1979, blacks accounted for 22% (Pet. App. A–25 n.22).

[21] Petitioners also contend that the court erred in requiring that promotions be based on scores derived from the assessment center portion of the test while finding that the test as a whole had not been validated. The court of appeals admitted that its solution was not ideal, but it declined to sanction further delays in affording a remedy to those who had suffered discrimination here. Consequently, the court chose—as other courts have done—to require petitioners to use the most nearly job-related means available to make interim selections. See *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971); *Oburn* v. *Shapp*, 521 F.2d 142, 152 (3d Cir. 1975); *NAACP* v. *Allen*, 493 F.2d 614, 617–618 (5th Cir. 1974). The court of appeals limited the candidates eligible for promotion to persons who met petitioners' basic qualifications in terms of experience and job performance

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and who had passed the multiple choice portion of the challenged test (Pet. App. A–27). Moreover, the order in which appointments were to be made is based on performance on the portion of the test that the court found to be most closely job-related. Accordingly, the court of appeals' decision represents a well-reasoned effort to tailor relief to petitioners' undisputed need for immediate appointments of qualified personnel, tempered by the need to secure the equal opportunity rights guaranteed to the black firefighters by Title VII.

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